

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In re)
)
) **DOCKET NO. 14-CRB-0001-WR**
DETERMINATION OF ROYALTY) **(2016-2020)**
RATES AND TERMS FOR)
EPHEMERAL RECORDING AND)
DIGITAL PERFORMANCE OF SOUND)
RECORDINGS (WEB IV))

**THE NATIONAL RELIGIOUS BROADCASTERS
NONCOMMERCIAL MUSIC LICENSE COMMITTEE'S CORRECTED
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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INTRODUCTION AND SUMMARY

1. SoundExchange’s case regarding noncommercial licensees is easily summed up with reference to the amount of time devoted by its counsel during opening statements – of the more than seventy five pages of transcript, SoundExchange devoted exactly six sentences to arguing why – without any support – “we don’t see a reason for the change.” 4/27/15 Tr. 88:18-89:9 (SoundExchange Opening Statement).

2. Its case was similarly cursory – it presented no evidence in support of its noncommercial fee proposal. Thus, SoundExchange has essentially defaulted. There is no basis for the Judges (i) to adopt SoundExchange’s fee proposal, or (ii) not to adopt the proposal of the National Religious Broadcasters Noncommercial Music License Committee (the “NRBNMLC”), which was supported by evidence.

3. As the NRBNMLC demonstrated, noncommercial webcasting has stagnated at levels below the Aggregate Tuning Hour (“ATH”) threshold specified in the existing regulations– SoundExchange agrees that most of the religious noncommercial broadcasters that the NRBNMLC represents (“Noncommercial Broadcasters”) are paying only the minimum fee. No noncommercial webcasters are paying CRB-set commercial usage fees. Some are capping listenership. And those who did pay them in earlier years took steps that avoided them in later years – for example, by switching to alternative rate structures or reducing their online listenership. NRBNMLC Proposed Findings of Fact (“PFF”) Part I.C, *infra*. Thus, the current noncommercial fees – which SoundExchange proposes to continue – should be changed.

4. SoundExchange is wrong, however, to argue that usage fees above the minimum fee’s ATH threshold don’t matter. Essentially, SoundExchange believes that once a noncommercial broadcaster exceeds a certain ATH level, it should be treated

exactly like a commercial entity. SoundExchange has presented no evidence to support this view. Professor Rubinfeld was the sole expert witness who discussed SoundExchange's fee proposal, and he presented absolutely no evidence or analysis to support that proposal other than to claim that very few, if any, noncommercial webcasters would ever pay his proposed commercial usage fees. On that, he is right, but that is a reflection of the fact that the fees are too high. Professor Rubinfeld and SoundExchange are wrong to say that noncommercial services should be treated like commercial services or that the usage rates don't matter. About 25 noncommercial webcasters are paying usage fees under an alternative rate structure that are different – and lower – than the CRB noncommercial webcaster rates. *See infra* ¶ 135. Those rates, however, still are exorbitant and are not reflective of rates that would exist in a hypothetical effectively competitive market.

5. SoundExchange also presented rebuttal testimony from Professor Lys to criticize the NRBNMLC's proposal, but it became evident that he had done no analysis to support his cursory conclusions. Rather, Professor Lys opined on the listening habits of noncommercial radio listeners without any analysis, study, or expertise.

6. Neither expert examined any relevant marketplace evidence, including two license agreements reached by SoundExchange with participants to this proceeding. Instead, Professor Rubinfeld ignored the unique characteristic of noncommercial entities and relied primarily on agreements with commercial interactive music services to derive the usage rates he proposes to apply to noncommercial entities. These rates do not represent competitive marketplace rates even for commercial broadcasters or other statutory services, much less for noncommercial broadcasters. This is hardly a showing

by SoundExchange of what a willing buyer and willing seller would agree to in a hypothetically competitive market. There is simply no evidentiary basis to adopt SoundExchange's proposal.

7. The NRBNMLC, by contrast, has pointed to numerous unique characteristics of Noncommercial Broadcasters based on their status as simulcasters and their status as non-profit entities that show that noncommercial buyers would agree to tiered and capped flat fees at levels much lower than rates for commercial entities in an effectively competitive market. Indeed, noncommercial broadcasters and webcasters always have paid much lower fees than commercial webcasters in every webcasting license period to date since the right was first expanded to cover webcasting about 17 years ago. *Infra* PFF Part II.B.2.

8. The NRBNMLC joins the National Association of Broadcasters ("NAB") in its argument that the characteristics of simulcasters – including both noncommercial and commercial simulcasters – point to a significantly lower rate. Noncommercial and commercial radio simulcasters share many characteristics:

- The primary online transmissions are simulcasts of their terrestrial radio programming. The only significant difference is the medium over which that programming is heard – over the Internet instead of over the air
- Both simulcast programming by the same hosts and DJs who keep the listeners company on their terrestrial broadcasts.
- Both actively foster strong connections with the local communities that they serve.
- Both transmit substantial amounts of nonmusic programming that contribute significantly to the popularity and unique flavor of those broadcasts and simulcasts and reduces the relative value of music in that programming as compared with a pureplay service. In the case of noncommercial religious broadcasters, this nonmusic programming often takes the form of talk and teaching programs as well as local church

services. In fact, one NRBNMLC witness testified that simulcasting listenership peaks during the station's nonmusic programming.

- On a listener-for-listener basis, the promotional impact of simulcasts is the same as the impact caused by terrestrial broadcasts, and artists and labels actively seek it out.
- Both stream in large part as a way to connect with their local over-the-air listeners, making their simulcasts secondary to their terrestrial broadcasts in importance.

See generally infra PFF Part III. Each of these factors indicates that the amount a willing simulcast buyer and a willing seller would agree to in an effectively competitive market is a much lower rate. Further, as argued by NAB, SoundExchange's primary convergence theory is completely inapplicable to simulcasters who operate a radio service and not a music service. *See* NAB's Proposed Findings of Fact and Conclusions of Law ("NAB PFFCL") Part III.B. This, too, points to a lower rate for all simulcasters.

9. Noncommercial Broadcasters, however, also differ from commercial broadcasters and webcasters in several fundamental ways that support an even lower rate. The evidence shows that Noncommercial Broadcasters are organized and operated exclusively to advance religious, charitable, educational or other non-profit goals – they do not seek to maximize profit; instead they seek to educate and encourage their listeners. Importantly, Noncommercial Broadcasters' sources of funds are limited; almost every dollar to fund noncommercial broadcaster operations is donated by a listener and every dollar is used to serve listeners, not maximize profit. Noncommercial Broadcasters' heavy reliance on their listeners for support, which is not guaranteed from year to year and does not increase proportionally with listenership, significantly lowers the amount that a noncommercial willing buyer would be willing to pay for the sound recording

performance right in an effectively competitive market and indicates that flat, predictable and affordable fees are essential. *Infra* PFF Part IV.B.

10. Numerous marketplace agreements and other reference points show that willing buyers and willing sellers repeatedly have agreed to a flat-fee structure for paying copyright royalties. These include:

- SoundExchange’s agreement with College Broadcasters, Inc. (“CBI”), which (a) sets a flat annual fee of \$500 per station or channel for all eligible noncommercial educational webcasters that stream below specified ATH threshold and (b) includes no usage fees (*infra* PFF Part V.B.1);
- SoundExchange’s agreement with National Public Radio (“NPR”) and the Corporation for Public Broadcasting (“CPB”), which sets a flat annual fee that covers hundreds of stations across NPR’s network and permits NPR/CPB to increase the number of covered stations for a flat annual \$500 per-station fee (*infra* PFF Part V.B.2);
- the fees under the section 118 statutory license for Noncommercial Broadcasters’ performance of musical works, which embody a flat fee structure (*infra* PFF Part V.B.3); and
- SoundExchange’s public support for proposed legislation that would grant a sound recording performance right applicable to terrestrial radio but would cover noncommercial stations for a flat annual fee of \$500 or \$1,000, depending on their gross receipts (*infra* PFF Part V.B.4).

11. Consistent with this marketplace evidence and in keeping with Noncommercial Broadcasters’ need for predictable and affordable fees, the NRBNMLC proposes a per-station flat annual fee of \$500 to stream to up to 400 average concurrent listeners annually. The NRBNMLC proposes to increase the number of average listeners permitted under the \$500 fee from the current 218 level to 400 because the current 218-listener threshold (159,140 monthly ATH)¹ for Noncommercial Broadcasters has been in

¹ 159,140 listener hours/month * 12 months/year * 1 year/365 days * 1 day / 24 hours = 218 listeners.

the regulations since 2006 and is based on a 2004 survey of listening levels of certain noncommercial streaming stations.

12. Above that listenership, the NRBNMLC proposes that noncommercial webcasters pay additional tiered, flat fees for increased listenership – namely, \$200 tiers for each additional 100 average listeners – capped at \$1500 per station or channel. This tiered structure would allow Noncommercial Broadcasters to increase their listenership without fear of spiraling costs and would incentivize Noncommercial Broadcasters to venture above the current ATH threshold in the face of more predictable and affordable fee liability. That increased streaming would, in turn, create additional revenue for record labels and artists. The NRBNMLC proposes annual, rather than monthly, listener thresholds because they are easier to administer and they enable Noncommercial Broadcasters to balance out unpredictable spikes in listening.

13. The NRBNMLC proposes to amend the current ATH definition to make clear that programs that do not include copyrighted sound recordings, such as talk and teaching programs, do not count in determining ATH for a particular period. SoundExchange should not be permitted to benefit from listenership that does not include sound recordings that are subject to the statutory license. SoundExchange’s agreement with NPR includes a similar provision, which supports this regulation. *See infra* PFF Part V.B.2.

14. In sum, SoundExchange has defaulted on its obligation to support its rate proposal for noncommercial webcasters by failing to present any evidence. The NRBNMLC’s rate proposal, however, is supported by substantial evidence. The differences between radio simulcasters and pureplay webcasters points to a lower rate.

The differences between noncommercial and commercial entities point to an even lower rate for noncommercial simulcasters than commercial entities. And the marketplace evidence shows that predictable and affordable flat fees are what willing buyers and willing sellers would agree to in a hypothetical effectively competitive market. The Judges should adopt the NRBNMLC's rate proposal.

PROPOSED FINDINGS OF FACT

I. THE PARTIES AND THE STATE OF NONCOMMERCIAL WEBCASTING

A. NATIONAL RELIGIOUS BROADCASTERS NONCOMMERCIAL MUSIC LICENSE COMMITTEE AND REPRESENTED STATIONS

15. The NRBNMLC is a standing committee that represents the interests of religious and other mixed-format noncommercial radio stations in music licensing matters. Emert WDT ¶ 16²; 5/21/15 Tr. 5255:11-15 (Henes). It was formed as the noncommercial arm of the National Religious Broadcasters Music License Committee ("NRBMLC"), which, in turn, is a committee of the National Religious Broadcasters. Emert WDT ¶ 16.

16. The NRBNMLC represents a wide variety of noncommercial radio stations, ranging from small single-station operators to larger multi-station companies who are, or are interested in, simulcasting ("Noncommercial Broadcasters"). All NRBNMLC stations, however, share certain characteristics. First, they are non-profit organizations and must advance a religious, educational, charitable or other non-profit goal. Emert WDT ¶ 18. Second, they are prohibited from selling advertising in

² For the Copyright Royalty Judges' convenience, the NRBNMLC is submitting herewith an Index of Witness Testimony by Citation Format, which identifies where in the record cited sources may be found.

accordance with their licenses from the Federal Communications Commission (“FCC”) and thus must rely on other sources of funding, such as listener donations. Emert WDT ¶ 18. Third, like commercial radio stations, NRBNMLC stations focus principally on their over-the-air broadcasting activities rather than Internet simulcasting – *i.e.*, the simultaneous transmission online of a radio station’s over-the-air programming. Emert WDT ¶¶ 28-29; Henes WDT ¶ 16; 5/21/15 Tr. 5265:16-5266:4 (Henes). As Gene Henes testified, the five simulcast streams from The Praise Network’s stations “are the same” as the terrestrial broadcasts. 5/21/15 Tr. 5263:14-17 (Henes). Simulcasting does not allow any level of listener interactivity. *See* NAB PFFCL Part III.B.

17. The noncommercial stations that the NRBNMLC represents in this proceeding are “public broadcasting entities,” a term defined in 37 C.F.R. § 253.2 as “a noncommercial educational broadcast station as defined in section 397 of [United States Code] title 47.” That section, in turn, defines noncommercial educational broadcast stations as radio stations that are licensed by the Federal Communications Commission to operate as noncommercial educational radio stations, and are owned and operated by public agencies, municipalities, or non-profit entities. 47 U.S.C. § 397(6). Such non-profit entities must operate “exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes.” 26 U.S.C. § 501(c)(3).

B. NRBNMLC WITNESSES

18. **Joseph Emert** is the founder and current President of Life Radio Ministries, Inc. in Griffin, Georgia, which operates as NewLife FM. Emert WDT ¶¶ 1, 5. Mr. Emert has over 45 years of experience as a noncommercial broadcaster and has held a number of different positions with multiple radio stations, including Announcer, News Director, Program Director, General Manager, Board member, and now Founder and

President. Emert WDT ¶¶ 2-6. NewLife FM operates two stations: one has served the south metro Atlanta and north Macon, Georgia communities for 20 years; the other has served Peachtree City, Georgia for over four years. Emert WDT ¶ 7. NewLife FM provides mixed-format programming described as “biblical teaching, relevant culture-changing information, and music” that “offers spiritual encouragement and personal challenge.” Emert WDT ¶¶ 8, 9. While NewLife FM’s core focus is on its terrestrial radio ministry, it also has been simulcasting programming over the Internet for several years to make it easier for local listeners to connect with its ministry. Emert WDT ¶ 27. NewLife FM’s focus on the local community is reflected by its online streaming listenership, as 75-80% of listener sessions originate in the station’s core Atlanta and Macon communities. Emert WDT ¶ 28.

19. Gene Henes is the President of the Board of Directors of The Praise Network, Inc., a non-profit religious organization based in O’Neill, Nebraska. Henes WDT ¶ 1. Mr. Henes is a former farmer turned on-air announcer who started his radio career with The Praise Networks’ first station, KGRD, in 1992. Henes WDT ¶ 2. Mr. Henes has held a variety of different positions with The Praise Network in his 23-year tenure with the network, including Program Director, Music Director, Station Manager, and now President and member of The Praise Network’s Board of Directors. Henes WDT ¶ 2. In his work with The Praise Network, Mr. Henes helps “bring Christian Radio to rural communities and to assist churches in reaching their local areas with the Christian message,” which is the larger goal of the broadcasting group. Henes WDT ¶ 6; 5/21/15 Tr. 5256:24-5257:9 (Henes). The Praise Network owns and operates nine terrestrial stations and eleven translators in four areas in the Midwest throughout Nebraska, South

Dakota, Kansas, and Colorado. The stations generally broadcast a mixture of Christian music and nationally syndicated Christian programming that focuses on teaching and worship. *Henes WDT ¶¶ 7-10*. While The Praise Network has committed significant resources to reaching their terrestrial radio listeners throughout the Midwest, the broadcast group also streams all of their stations online, starting with Tri-State Praise in May 2006. *Henes WDT ¶ 12*. The Praise Network simulcasts to provide a convenient listening alternative to over-the-air broadcasting offerings for their local listeners who may experience a low or blocked signal. *Henes WDT ¶ 13; accord 5/21/15 Tr. 5263:20-5264:1 (Henes)*. Virtually all of The Praise Network's donations come from listener contributions within its terrestrial broadcast footprint. *Henes WDT ¶ 15*.

C. THE CURRENT RATE STRUCTURE IS SUPPRESSING LISTENERSHIP TO LEVELS BELOW THE SPECIFIED ATH THRESHOLD AND IMPEDING NONCOMMERCIAL BROADCASTERS' ABILITY TO SERVE THEIR ONLINE LISTENING COMMUNITIES.

20. The current rate structure for noncommercial webcasters creates perverse incentives for noncommercial broadcasters not to grow listenership beyond certain modest levels, which ultimately harms the public interest. Under current regulations (which continue ATH levels that have been in place for ten years), the annual fee of \$500 allows a noncommercial webcaster to stream up to 159,140 ATH per month, the equivalent of 218 average listeners. *Emert WDT ¶ 33; 37 C.F.R. § 380.3(a)(2)(i)*. Above that level, however, current regulations require noncommercial broadcasters to pay full commercial webcaster per-performance rates. *37 C.F.R. § 380.3(a)(2)(ii)*. While most noncommercial webcasters stream at ATH levels below the threshold, record evidence shows that some are doing so by design, purposely limiting their listenership to avoid having to pay usage fees. *See infra* PFF Part I.C. About 25 larger noncommercial

broadcasters have avoided paying these commercial usage fees applicable to noncommercial webcasters by opting into alternative rates available to noncommercial webcasters under the Webcaster Settlement Act (“WSA”). SX Ex. 124-013; *see infra* PFF Part VI.C.2. These rates are much lower than the CRB-set rates but still much too expensive to induce most noncommercial webcasters to pay them. And for the tiny handful of noncommercial webcasters that have had the misfortune of paying commercial usage rates, they have quickly taken steps that have enabled them to avoid those exorbitant fees in subsequent license years. In other words, the current rates, which SoundExchange proposes to continue, are suppressing the growth of noncommercial simulcasting above the ATH threshold rather than promoting it.

21. Despite the overall growth of online listening, there has been very little movement of noncommercial webcasters across the ATH threshold since 2011. SoundExchange’s expert Dr. Blackburn admitted that there may have been only “a couple” of webcasters that moved from paying the \$500 minimum fee to paying higher amounts. 5/04/15 Tr. 1707:9-1707:15 (Blackburn). It cannot be seriously argued that noncommercial simulcasting listenership above the ATH threshold is growing for most stations.

22. But what these numbers do not show is why. The evidence indicates that at least some noncommercial broadcasters have chosen to limit their online listenership to avoid hitting the 218 average listener threshold and risk having their costs spiral out of control. Emert WDT ¶ 38; 5/21/15 Tr. 5271:13-5271:15 (Henes). As Mr. Emert explained:

The idea of a fee that increases directly with listenership is a scary prospect for Noncommercial Broadcasters who rely on listener donations

to support their operations. Unless these broadcasters turn away listeners from accessing their programming online if listenership hits a specified cap, they do not know what their streaming bill would be until the end of the year under such a fee structure and thus do not know whether they would be able to raise the funds necessary to pay this bill through appeals to their listeners.

Emert WDT ¶ 32; *accord id.* ¶ 38.

23. It is not surprising that a number of noncommercial broadcasters would choose to cap listenership below the ATH threshold, and both Mr. Emert and Mr. Henes testified that they are aware of noncommercial broadcasters who have chosen to control costs in this manner: Emert WDT ¶ 38 (“I also am aware of Noncommercial Broadcasters who do stream, but they impose caps on the number of listeners their programming may reach to stay under the listenership level at which usage fees are owed”); 5/21/15 Tr. 5271:13-5271:15 (Henes) (aware of “a Minnesota broadcaster that has capped his stream as well as a North Carolina broadcaster that has done so”). There is no way of knowing exactly how many Noncommercial entities have done this, but it obviously is a known problem.

24. The evidence shows that a few who have, perhaps unwittingly, crossed the ATH threshold quickly retreated back across the line – one can assume by capping their streams. As shown below in *infra* Part VI.C.2, several noncommercial webcasters’ listenership fell dramatically from one year to the next to fall below the ATH threshold.

25. Some of the larger noncommercial broadcasters are unable or unwilling to take measures to limit their streams – instead, the evidence shows that they have taken measures that have avoided paying exorbitant CRB commercial rates. At least two stations decided to affiliate with NPR and thus converted to an alternative rate structure

with SoundExchange. Two others significantly reduced their online listenership to fall largely below the threshold. *See id.*

26. The rates proposed by SoundExchange disincentize noncommercial broadcasters from growing listenership and serving their online audiences, which is not only not helpful, but indeed is harmful to the licensees. Turning listeners away from the noncommercial broadcasters' programming is antithetical to the mission of these non-profit organizations because it works "against our mission of reaching as many people as we can with our message of hope and inspiration, but some have chosen to do so as a preferred alternative to having to pay unpredictable and very expensive usage fees to SoundExchange that become even more unaffordable as listenership grows." Emert WDT ¶ 38. Gene Henes reported that:

We could cap the stream at a certain amount, but then we're defeating the purpose of what we're trying to do. We're trying to reach as many people as possible with the Gospel message. Going back to my own experience, someone that is in the position I was in as a young husband, young father, and having the benefit of Christian radio to help out, that would go against everything we would do, to block people out from listening, from hearing it.

5/21/15 Tr. 5270:24-5271:9 (Henes); *accord* Henes WDT ¶ 25 (capping listenership is "an extremely unattractive option"). These onerous rates are not what these willing buyers would agree to in a hypothetical effectively competitive market.

II. DIFFERENT TYPES OF LICENSEES SHOULD BE LICENSED AT DIFFERENT RATES IN THE HYPOTHETICAL EFFECTIVELY COMPETITIVE MARKETPLACE AT ISSUE.

27. The Judges rightly observed in their notice commencing this proceeding that:

"In the hypothetical marketplace we attempt to replicate, there would be significant variations, among both buyers and sellers, in terms of

sophistication, economic resources, business exigencies, and myriad other factors.”

Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (Web IV): Notice Announcing Commencement of Proceeding With Request For Petitions To Participate, 79 Fed. Reg. 412, 413 (Jan. 3, 2014) (“*Web IV Commencement Notice*”) (quoting *Digital Performance Right in Sound Recordings and Ephemeral Recordings: Final Rule and Order*, 72 Fed. Reg. 24084, 24087 (May 1, 2007) (“*Web I*”)).

28. They further observed that:

When such significant variations exist, especially among willing buyers, each buyer may place a different economic value on a performance. To impose a rate that is economically appropriate for one such willing buyer upon any or all other willing buyers might not necessarily satisfy the statutory requirement of replicating the marketplace, but rather might be inconsistent with the rate structure of an actual market for sound recordings.

Web IV Commencement Notice, 79 Fed. Reg. at 413. The Judges also recognized that “economic differences between ... businesses’ would cause a per-performance rate appropriate for one type of business ‘to overstate the market value’ of a performance for another type of business.” *Id.* (quoting *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings: Final Rule and Order*, 67 Fed. Reg. 45240, 45258 (July 8, 2002) (“*Web I*”)) (alteration in original).

29. These observations are consistent with the statutory requirement, discussed below, that the Judges differentiate among different types of services in setting rates. *See* 17 U.S.C. § 114(f)(2)(B). *See infra* NRBNMLC Proposed Conclusions of Law (“PCL”) Part II.B.

30. In other words, rates should not be set based on a one-size-fits-all single market for digital performances of sound recordings, where the sellers present one price to all buyers and those who cannot afford it are out of luck. Rather, economic variations and other differences among different groups of willing buyers should be considered to arrive at rates to which particular groups of similarly situated willing buyers and willing sellers would agree in an effectively competitive marketplace.

31. With respect to noncommercial broadcasters in particular, the Copyright Arbitration Royalty Panel (“CARP”) observed in *Web I* that “[a]pplying the same commercial broadcaster rate to noncommercial entities affronts common sense.” Report of the Copyright Arbitration Royalty Panel, Docket No. 2000-9, CARP DTRA 1& 2, at 89 (Feb. 20, 2002) (“CARP Report”).

32. As discussed below, Noncommercial Broadcasters differ from commercial statutory music services in two overarching respects: (1) they overwhelmingly are broadcast simulcasters rather than pureplay music services – and thus are very different from the non-statutory commercial on-demand services that form the basis for SoundExchange’s fee proposal above the ATH threshold; and (2) they are non-profit rather than commercial entities.

33. As broadcast simulcasters, Noncommercial Broadcasters differ from webcasters in that they:

- overwhelmingly focus on their core broadcast operations and their local listeners, whom they are able to reach over the air and without payment of any sound recording performance fees; this renders simulcasting less essential to broadcasters than webcasting is for pureplay webcasters and indicates that broadcasters would be willing to pay less for it; and
- unlike pureplay webcasters, provide their listeners with extensive nonmusic content, including talk and teaching programs, news, weather,

information, community affairs shows, and the companionship of on-air personalities to differentiate themselves to their listeners; this renders music of relatively less importance to simulcasters than to pureplay music services.

See infra PFF Part III.

34. Similarly, as non-profit entities, Noncommercial Broadcasters differ from commercial entities in that they:

- further educational, religious, or other charitable purposes rather than profit-seeking ones;
- cannot sell advertisements or run them in their programming;
- primarily depend on voluntary listener donations to fund their operations that vary from year to year and are not guaranteed such that having affordable and predictable expenses is paramount; and
- cannot and do not pocket funds that they receive for personal gain but rather use them to serve their listeners.

Infra PFF Part IV.

35. These differences would influence the willing buyer-willing seller rate to which Noncommercial Broadcasters would agree in the hypothetical competitive marketplace that the Judges are required to consider. The differences mandate that a separate rate be set for noncommercial licensees – a point that SoundExchange does not dispute. Moreover, SoundExchange has offered no basis to apply commercial usage rates to these noncommercial services – and certainly no basis to apply rates based on its inflated and invalid interactive services benchmarks.

III. IN A COMPETITIVE MARKET, DIGITAL SOUND RECORDING PERFORMANCE FEES FOR NONCOMMERCIAL BROADCASTERS WOULD BE LOWER THAN THOSE FOR PUREPLAY WEBCASTERS DUE TO THEIR UNIQUE CHARACTERISTICS AS BROADCASTERS.

36. Noncommercial Broadcasters are radio broadcasters that simulcast their terrestrial broadcast programming over the internet. The evidence shows that

simulcasters are fundamentally different from the Internet-only webcasters participating in this proceeding and should be afforded a different royalty rate.

37. For example, the local focus of simulcasters shows that their internet services are provided for the convenience of their local listeners. As such, simulcasting is a much more expendable part of broadcasters' businesses, and this drives down the rates to which willing buyer broadcasters would agree to as compared with pureplay services, which play only music and seek a national audience.

38. Simulcasters – and especially noncommercial simulcasters – also transmit a great deal of valuable nonmusic content – including talk and teaching programs, news, weather, traffic, and the companionship of DJs – all of which distinguish one station playing the same music from another. The importance of this nonmusic programming drives the relative value of the music content downwards.

39. In addition, simulcasting as a whole is more promotional and less substitutional than other webcasting. Simulcasting also, at heart, is radio, online – record labels have long recognized the promotional value of radio to sell music. Simulcasting also is not converging, as SoundExchange claims in its case. For this reason, SoundExchange witnesses have admitted that simulcasters should be licensed at a lower rate.

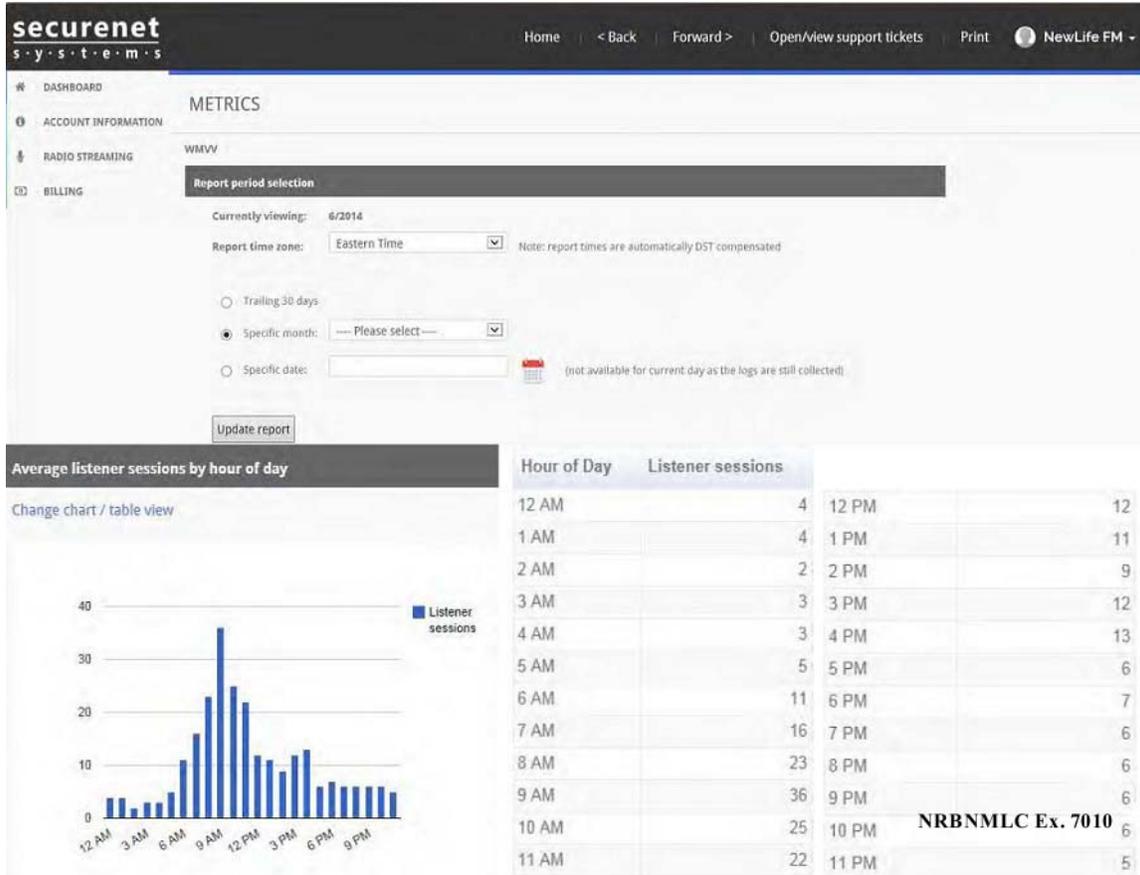
40. NAB discusses these important differences in detail in NAB PFFCL Parts III.A-C, and Noncommercial Broadcasters hereby incorporate those Parts as if fully set forth herein.

A. NONCOMMERCIAL RELIGIOUS SIMULCASTERS PROVIDE THEIR LISTENERS WITH EXTENSIVE NONMUSIC CONTENT THAT RENDERS MUSIC OF RELATIVELY LESS IMPORTANCE TO THEM THAN TO PUREPLAY SERVICES.

41. Noncommercial Broadcasters transmit a wide variety of nonmusic content both over the air and online that renders music a less important programmatic element than it is for a pureplay music service. NewLife FM, for example, transmits “a mixed format of Christian programming that includes significant amounts of both talk and teaching content and music.” Emert WDT ¶¶ 9, 11 (discussing talk and teaching programs); NRBNMLC Ex. 7001. These programs cover a wide variety of topics and are hosted by a wide variety of personalities aimed to inform and encourage their listeners. Examples include “Uncommon Moments,” hosted by Super Bowl-winning coach Tony Dungy, “InTouch,” with Dr. Charles Stanley, “MoneyWise,” with Howard Dayton and Steve Moore, “Revive Our Hearts,” with Nancy Leigh DeMoss, and “Just Thinking,” hosted by Ravi Zacharias, to name just a few. Emert WDT ¶ 11; NRBNMLC Ex. 7001.

42. NewLife FM also transmits “current local, regional, national, and international events throughout the day.” Emert WDT ¶ 13. During the past year, NewLife FM replaced a two-hour weekday block of programming from 5-7 p.m. with a talk show. Emert WDT ¶ 21. Although it wondered whether listeners might complain about the missing music, it “received overwhelmingly positive feedback about this change” from its listeners. Emert WDT ¶ 21.

43. NewLife FM’s non-music programming is more popular than its music programming online. Indeed, its “highest listenership is from 9 a.m. until noon on weekdays, when [it] transmit[s] teaching programming.” Emert WDT ¶ 29; NRBNMLC Ex. 7010. The following chart illustrates this pattern for June 2014:



44. The Praise Network also provides its listeners with a wide array of nationally syndicated talk and teaching programming, constituting about 50% of its programming content. Henes WDT ¶¶ 7-10; NRBNMLC Exs. 7012-7016. The stations’ programming is arranged “so basically most hours, the first half hour is music, and the second half hour contains a [talk or teaching] program.” 5/21/15 Tr. 5259:1-12 (Henes). Examples include: Insight for Living (Chuck Swindoll); Turning Point (David Jeremiah); Listen to the Bible (Max McLean); Reaching Your World (Luis Palau); and Unshackled (Pacific Garden Mission). The Praise Network stations also broadcast both world and national news programs, as well as news programs focused on Nebraska and South Dakota. Henes WDT ¶¶ 7-9; NRBNMLC Exs. 7012 – 7015.

45. The Praise Network’s AM “daytimer” station currently features approximately 60% nationally syndicated Christian talk and teaching, 40% Southern Gospel music, and two local church services on Sunday mornings. Most of the stream for the AM station at night is talk only, except in the winter months where sunlight hours are very short. Henes WDT ¶ 10; NRBNMLC Ex. 7016.

46. Radio broadcasters also provide value unrelated to music programming through personal connections with local on-air talent. As Mr. Emert testified, “Our local on-air people and other personnel also add significant value to our listeners and have invested many years connecting with them.” Emert WDT ¶ 22. Mr. Henes confirmed that “Our stations serve as a vital connection among the Christian communities in our very broad listening area, and our listeners connect on a personal level with our on-air personalities. Our listener family is very loyal – they look at us as friends and family who they have known for a long time.” Henes WDT ¶ 19.

47. The significant amount of talk and teaching programming that Noncommercial Broadcasters provide as well as the companionship offered by their on-air talent renders music a relatively less important – and less valuable – ingredient to their success than it is to a music-only pureplay webcaster.

B. SIMULCASTERS FOCUS ON THEIR LOCAL LISTENERS WHOM THEY ARE ABLE TO REACH BY THEIR CORE BROADCAST SIGNAL; SIMULCASTING IS THUS MORE EXPENDABLE FOR NONCOMMERCIAL BROADCASTERS THAN FOR PUREPLAY WEBCASTERS, WHICH REDUCES THEIR WILLINGNESS TO PAY SOUND RECORDING ROYALTIES.

48. As is true for commercial radio broadcasters and as differentiated from other statutory webcasters, Noncommercial Broadcasters have an overwhelmingly local focus in their programming, target audience, DJs, and actual online audience. Given that

Noncommercial Broadcasters' target and actual online audience consists of the same listeners that those broadcasters are already able to reach over the air without payment of any royalties, simulcasting is far less essential to their overall operations than it is for pureplay webcasters, who would not exist if they did not stream. Therefore, Noncommercial Broadcasters virtually by definition are not willing to pay as much to reach their target audience online as are pureplay webcasters.

49. Noncommercial Broadcasters focus on serving their local listeners, and that is evident in their programming. Mr. Emert, for example, testified that the mission of his two Georgia-based stations, operating as "NewLife FM," "is to serve listeners in South Metro Atlanta, Middle Georgia, and North Macon." Emert WDT ¶ 8. NewLife FM broadcasts several talk programs "that are locally hosted by NewLife FM's staff." Emert WDT ¶ 10. In addition to national news, NewLife FM broadcasts "a local newscast called 'Georgia News You Can Use,'" and "throughout the day, [NewLife FM's] local hosts will mention local news of interest." Emert WDT ¶ 13. It also "produce[s] a 25-minute program called 'Georgia Town Crier,' in which [it] interview[s] local and national guests of interest." *Id.* ¶ 11. "A foundational goal of the program is to feature guests with a local of Statewide connection." *Id.* ¶ 11.

50. Local connections are re-enforced by broadcasters' involvement in their local communities. NewLife FM, for example, "emphasize[s] its availability to the communities it serves" and has participated in multiple community charitable events that enable NewLife FM's staff to connect with its listeners. Emert WDT ¶¶ 15, 23. In the three months alone prior to October 2014:

staff members have spoken in local churches, written articles in a local community-wide magazine, spoken to a civic group, guest-hosted a local

High School football game's half-time show, met with a local gathering of independent music artists, mostly from Georgia, broadcast interviews recorded on site from the Atlanta Motor Speedway, and sponsored and hosted a summertime community parade.

Emert WDT ¶ 23. As of last October, four of NewLife FM's six-member staff "have been with NewLife FM for over 17 of [NewLife FM's] 19-year on-air existence." Emert WDT ¶ 22.

51. Establishing local connections are particularly important when a broadcaster covers a vast territory. Unlike NewLife FM, The Praise Network's stations are located in very broad and rural areas. As Gene Henes described, "All of our stations are located in very rural areas – the closest metropolitan areas are at least three to four hours away for most of our listeners." Henes WDT ¶ 19. "Many of those communities may be a thousand people or even less.... Where my office is located, it's 75 miles to the nearest Walmart." 5/21/15 Tr. 5257:22-5258:2 (Henes).

52. In such cases, the local connection and personal relationships that broadcasters foster with their listeners are particularly important. "Our stations serve as a vital connection among the Christian communities in our very broad listening area, and our listeners connect on a personal level with our on-air personalities. Our listener family is very loyal – they look at us as friends and family whom they have known for a long time." Henes WDT ¶ 19. The stations' websites also serve as a font of local information, including calendars that provide information about local events of interest to listeners, such as worship services, prayer meetings, book sales and other community events. Henes WDT ¶ 22; *accord* Emert WDT ¶ 24.

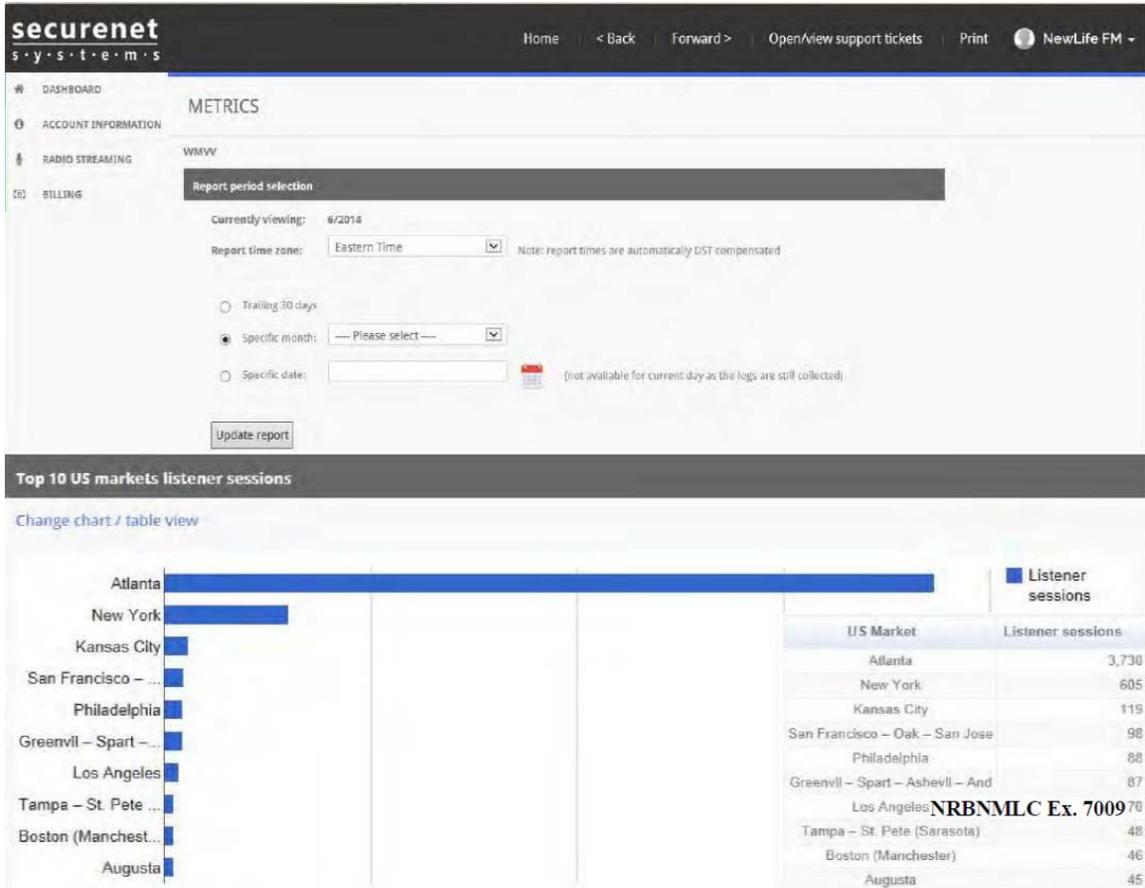
53. Noncommercial broadcasters' local focus carries over to their simulcasts. NewLife FM, for example, simulcasts its programming "to serve [its] local broadcast

listeners by making it easier for them to connect with [its] ministry and the content that they know and trust through a variety of devices other than an AM/FM radio.” Emert WDT ¶ 27. Mr. Henes similarly testified that “we view our websites and streaming primarily as a convenience to our local over-the-air audience, to whom we try to provide a useful, inspirational, and entertaining product.” Henes WDT ¶ 13. He stated:

Where we live, there’s a large variance in terrains. FM stations don’t always reach down into the valleys. Maybe if someone’s working in an office or in a building that doesn’t have radio reception, they can listen online on their computer.... Anybody that’s familiar with AM knows that the quality can be good one day and just lousy the next. So it’s another option for our AM listeners who can’t get a good quality signal.

5/21/15 Tr. 5263:20-5264:8 (Henes); *accord* Henes WDT ¶ 13 (“[W]e have learned that our streaming operations assist [our listeners] in listening to our broadcasts when they have a low or blocked signal. Some of our listeners, for example, listen to the stream while they are at work, where office buildings interfere with reception of our terrestrial radio signals. Others listen to the streams when the terrestrial signal is inconsistent.”).

54. Not only is NewLife FM’s target online audience local, but its actual online audience is overwhelmingly local as well. Emert WDT ¶ 28. As Mr. Emert testified regarding NewLife FM, “[t]he vast majority of our listeners are local, which is precisely who we aim to serve.” Emert WDT ¶ 28. “For each month from June through September 2014, of the top 10 U.S. markets generating the most listener sessions, some 75-80% of those sessions originated in [NewLife FM’s] core Atlanta and Macon communities, where [its] stations are located.” Emert WDT ¶ 28; NRBNMLC Ex. 7009. The following graph from a year ago reflects this local focus:



NRBNMLC Ex. 7009 at 4. Similarly, The Praise Network believes that its listenership is also overwhelmingly local, as over 90% of its donors come from within the terrestrial listening area. *Id.* ¶¶ 11, 15; *accord* Henes WDT ¶ 13 (“Nearly all of our listeners from whom we receive feedback are within the over-the-air listening area for our network . . .”).

55. Stemming from this local emphasis, noncommercial and other broadcasters differ from pureplay webcasters in that they “focus on their over-the-air broadcasting operations – streaming is a secondary activity.” Emert WDT ¶ 18; Henes WDT ¶ 16. Unlike pureplay webcasters, whose sole (or at least core) business is webcasting online, broadcasters would still be able to reach their core listeners through their over-the-air broadcast if they stopped simulcasting altogether. Simulcasting is thus

more expendable to broadcasters than webcasting is to a pureplay webcaster, which affects broadcasters' willingness to pay to transmit their programming online. For example, Mr. Henes explained that "[w]e don't believe that the availability of our programming online is an essential factor to maintain our over-the-air audience." Henes WDT ¶ 16. The secondary nature of streaming to Noncommercial Broadcasters indicates that they would not be willing to pay as much to reach their target audience online as are pureplay webcasters, and certainly much less than the online interactive services that serve as SoundExchange's benchmarks. As Mr. Henes stated, "[b]ecause the internet stream is secondary to our broadcast and a service that we provide to our listening community, [streaming] might have to be terminated if fees were to increase." *Id.* ¶ 14.

C. THE SIGNIFICANT PROMOTIONAL VALUE OFFERED BY BROADCASTERS WEIGHS IN FAVOR OF A LOWER ROYALTY RATE.

56. Another trait shared by noncommercial and commercial broadcasters alike that points toward lower simulcaster rates than rates for other webcasters is the tremendous promotional value that simulcasters offer the record industry. There is little question that airplay of sound recordings on terrestrial radio – which necessarily includes airplay on a radio station's Internet simulcast – is promotional of record sales. Record labels service radio stations with free promotional copies of their sound recordings for the express purpose of obtaining this promotional airplay and spend [[REDACTED] industrywide to obtain this promotion. *See* NAB PFFCL III.C. Moreover, on a listener for listener basis, this promotional value is equally found on radio simulcasts of that same programming. NAB PFFCL III.C.3. Indeed, the section 114 statutory license requires the Judges to consider the promotional effect of a service on a record company's sales and other revenues. *See* 17 U.S.C. § 114(f)(2)(B)(i). NAB describes the

promotional value provided by radio broadcasters and simulcasters generally in Part III.C of NAB's PFFCL, and the NRBNMLC hereby incorporates that Part as if fully set forth herein.

57. This promotional value extends to noncommercial broadcasts and simulcasts in particular. NewLife FM, for example, "is constantly approached by music artists, their agents, and record labels asking [it] to considering airing their music," and those artists, labels, and agents frequently thank NewLife FM when that music is played. Emert WDT ¶ 25; NRBNMLC Exs. 7003-7008. One band's producer, for example, wrote NewLife FM to state:

We are so excited to see your station add their 1st single "In Every Corner" to your playlist. Thank you so much, because of your commitment to the song, it is the #1 song in the US being played by an independent artist!"

NRBNMLC Ex. 7006. Similarly:

- An indie artist wrote NewLife FM, stating: "I would greatly appreciate it and will be truly thrilled if you could please share your thoughts on the project and advise if songs from this work could air on New Life!" NRBNMLC Ex. 7003.
- Another artist wrote NewLife FM: "Thank you so much for playing my song, 'I Love You (feat. Vince Gill)' on your radio station Valentine's Day! I am so deeply honored and grateful to you for doing this!" NRBNMLC Ex. 7004.
- The Chief Operating Officer from Madison Line Records wrote: "I would like to say thank you and WMVV/WMVW Radio for choosing to play Lights Align[']s first radio single 'Your Name'." NRBNMLC Ex. 7007.
- A publicist for various Christian artists wrote: "Just checking on a few CDs we have sent your way. Would love to get your feedback on any of the songs you might be considering for airplay from the following projects." NRBNMLC Ex. 7008; *see also* NRBNMLC Ex. 7005 ("[W]hat a blessing that you've selected six songs!").

These communications show that artists and labels acknowledge the promotional value of Noncommercial Broadcasters' playing of their music.

58. The Praise Network also is continually asked by record companies and artists to play their music. Record labels provide free accounts to services such as Play MPE (plaympe.com) and notify The Praise Network through emails about new releases that are available for free download for airplay. Henes WDT ¶ 20, NRBNMLC Ex. 7016. The labels ask the stations to start playing the music for promotional purposes – called the “impact” date – in advance of the date the public is able to purchase it. 5/21/15 Tr. 6261:19-5262:6 (Henes) (“impact” date on promotional email from record label is the date stations are asked to add a song to rotation - in advance of date on sale to the public). Local artists have asked to be added to The Praise Network stations’ rotations; eventually, the stations adopted a Local Artist Policy, “to help explain to them what we were looking for, how to submit new music if they wanted to, if they chose to.” 5/21/15 Tr. 5262:13-5262:15 (Henes); NRBNMLC Ex. 7018. Local bands, such as *The Sunflowers*, occasionally have been added to the rotation. 5/21/15 Tr. 5262:19-5263:2 (Henes). Concert promoters also have asked The Praise Network stations to conduct phone interviews – and in some cases, in-person interviews – with artists as they travel through communities in the region. Henes WDT ¶ 20.

59. In sum, artists, record labels, and their representatives not only acknowledge the promotional power of Noncommercial Broadcasters, they actively seek it out through requests for stations to play music in the hopes of increasing sales. The value that artists and labels derive from this promotion should be factored into – and reduce – rates set for simulcasting.

IV. NONCOMMERCIAL BROADCASTERS DIFFER FROM COMMERCIAL ENTITIES IN FUNDAMENTAL WAYS THAT DEMONSTRATE THAT THESE ENTITIES WOULD BE LICENSED UNDER A DIFFERENT RATE STRUCTURE AND AT A LOWER RATE IN AN EFFECTIVELY COMPETITIVE MARKET.

60. By virtue of Noncommercial Broadcasters' non-profit status and the rules governing their activities, Noncommercial Broadcasters differ from all commercial entities – including even commercial broadcasters – in ways that establish that these non-profit entities would be licensed under a different rate structure and at lower rates than commercial entities.

A. NONCOMMERCIAL BROADCASTERS DO NOT SIMULCAST TO MAKE MONEY BUT RATHER TO UPLIFT, EDUCATE, AND INSPIRE THEIR LISTENERS.

61. Fee-setting for Noncommercial Broadcasters, such as this proceeding, should take into account the fundamentally different aims of commercial enterprises and noncommercial broadcasting. By designing programming that is desirable not so much for its universal appeal, but for its intrinsic value to their listeners, Noncommercial Broadcasters operate outside of the traditional incentives that determine the programming choices of their commercial counterparts. It follows that, because revenue maximization is not the end goal of noncommercial broadcasting, Noncommercial Broadcasters should not be subject to the same fee-setting guidelines as commercial entities that operate primarily to maximize profits.

62. “Noncommercial broadcasters are not ‘willing buyers’ of music in any commercial sense.” Emert WDT ¶ 36. Noncommercial religious broadcasters do not simulcast to make money but rather to uplift, educate, and encourage their listeners by bringing them messages of hope and encouragement through their teaching programs, Scripture readings, and inspiring music. *See* Emert WDT ¶ 18 (observing that

Noncommercial Broadcasters “must advance religious, educational, charitable, or other non-profit goals”).

63. As Mr. Emert testified, “We do not do what we do to make money, and we certainly are not motivated to increase our audience by a profit motive.” Emert WDT ¶ 36. Instead, the mission of NewLife FM “is to serve listeners ... with programming, including biblical teaching, relevant culture-changing information, and music, that offers spiritual encouragement and personal challenge and contains a Christ-centered and evangelistic focus.” Emert WDT ¶ 8. Similarly, the mission statement of The Praise Network states, “Every endeavor will be toward glorifying God and turning hearts toward Christ through programs of instruction, information and inspiration.” Henes WDT ¶ 6. The goal of The Praise Network is to bring Christian Radio to rural communities and to assist churches in reaching their local areas with the Christian message. *Id.* As Mr. Henes testified, as a religious nonprofit organization, “it is not our goal to make money operating its stations – our clear mission is to spread the word of Christ to our listeners.” *Id.*; accord 5/21/15 Tr. 5356:24-5257:14 (Henes) (explaining goal and message to bring “the Gospel message, the Christian message of Jesus Christ”).

64. As nonprofit organizations, Noncommercial Broadcasters are required by the IRS to further a nonprofit educational, religious, or other charitable purpose. *See* 26 U.S.C. § 501(c)(3). Noncommercial Broadcasters are subject to strict FCC licensing requirements regarding the noncommercial nature of their operations. *See* 47 C.F.R. § 73.503(a) (outlining FCC licensing requirements for noncommercial broadcasters); *see also* 47 C.F.R. § 73.4163 (referencing several FCC reports published in the Federal

Register for guidance regarding the required noncommercial nature of public broadcasting).

B. NONCOMMERCIAL BROADCASTERS HAVE DIFFERENT SOURCES OF FUNDING THAN COMMERCIAL LICENSEES.

65. Differences in the economics under which Noncommercial Broadcasters operate show that a different and lower rate structure would prevail in the noncommercial willing buyer-willing seller market. Controlling costs are very important when faced with a budget largely funded by donations, and noncommercial stations are faced with different economic realities than commercial stations.

66. Many noncommercial stations are small and operate with few resources and employees. For example, NewLife FM, which has two over-the-air stations, has four full-time and two part-time staff members and approximately 60 part-time volunteers. Emert WDT ¶ 14. The larger Praise Network, which has nine over-the-air stations and eleven translator stations, has only 30 part- and full-time employees. 5/21/15 Tr. 5252:13-5253:4 (Henes).

67. Noncommercial Broadcasters fund their operations “in a very different way from commercial radio stations.” Emert WDT ¶ 14. Commercial webcasters and simulcasters sell advertisements; the advertisers pay for the opportunity to reach an audience with their message. NAB PFFCL Part IV.A. Noncommercial Broadcasters, in stark contrast, cannot sell or air advertisements to generate revenue and are subject to a host of other regulations imposed by the Federal Communications Commission. Emert WDT ¶ 34 (observing that Noncommercial Broadcasters cannot “sell advertising no matter how large their listenership grows”); *id.* ¶ 18 (“[N]on-commercial broadcasters cannot sell advertisements but rather must depend primarily on donations from the

community they serve to fund their broadcasting”); Henes ¶ 11 (“Because our stations are noncommercial stations, we do not sell any advertising to be run on either our over-the-air broadcasts or our streamed programming. We are a nonprofit religious organization that depends on donations and other funding and services from our listeners and network and community underwriters who sponsor portions of our over-the-air programming”); *see also* 47 C.F.R. § 73.503(d); *see generally id.* §§ 73.501-73.599. Therefore, they must rely on other sources of funding to make ends meet.

68. Noncommercial religious stations have very limited ways to raise money to cover costs. First, donations directly to noncommercial religious stations based on the generosity of listeners make up the majority of funding. 5/21/15 Tr. 5266:23-5267:3 (Henes) (“Well, again, we're a nonprofit, noncommercial radio. We exist due to the fact of listener donations, basically”). As Joseph Emert described, “All in all, virtually our entire budget is funded by voluntary donations from individuals – either directly or through a program that we air – and corporations,” highlighting how much noncommercial radio broadcasters depend on their listeners to support them. Emert WDT ¶ 14. New Life FM obtains 60% of its budget from listener donations. Emert WDT ¶ 14. The Praise Network obtains just over half of its operating budget from listener donations. Henes WDT ¶ 11.

69. Second, unlike commercial broadcast syndication, Noncommercial Broadcasters are reimbursed for costs of broadcasting certain syndicated programs through agreements with nonprofit program sponsors, which share donations from their listeners with the stations. Emert WDT ¶ 14; Henes WDT ¶ 11. This means that a portion of listener donations are funneled from the national program provider to the station.

70. Third, a small portion of funding comes from donations from local businesses. Emert WDT ¶ 14 (“[L]ess than 10% of our budget is funded by donations from local business underwriters”); *accord*, Henes WDT ¶ 11. For The Praise Network, therefore, over 60% of funding comes directly or indirectly from listener donations; for NewLife FM, the amount is over 90%. *Id.*

71. Dependence on donations means that noncommercial religious stations cannot monetize streams with advertising and have “no guarantees from year to year of receiving a particular monetary amount in donations.” Emert WDT ¶ 31. Often, they must engage in substantial fundraising efforts just to meet their annual budgets. *See* Henes WDT ¶ 11.

72. Controlling costs are paramount when faced with a budget largely funded by unpredictable donations. As Gene Henes testified, “[w]ith limited revenue-generation methods ... any expense for a noncommercial broadcaster is a large expense.” Henes WDT ¶ 17. Rising costs for streaming are a significant concern. As Mr. Henes testified,

We are dependent on the local economy and a shrinking population base, both of which affect our giving levels, so rising costs would be a huge concern. If our costs go up, our options are very limited. We could devote more of our time and energy toward fundraising to try to cover these costs, but there is no guarantee that those efforts would be successful. They also would divert us from our core ministry and risk alienating our listeners, whom we want to encourage in their Christian walk, and not annoy by constantly asking them for funding. Otherwise, we would be forced to cut hours or drop staff.

Henes WDT ¶ 24.

73. Even fundraising with a larger audience base is not a guarantee of increased donations, when “a noncommercial station's financial support doesn't increase proportionally with increased listenership.” Henes WDT ¶ 26. In fact, as Gene Henes testified, only “a small percentage of our listeners make a donation.” 5/21/15 Tr.

5270:17-5270:18 (Henes). Hounding an audience for donations risks alienating a broadcaster's vital supporters. 5/21/15 Tr. 5273:13-5273:21 (Henes) (“Well, as a noncommercial, nonprofit organization, the only way we can raise funds is by going to our audience and asking for donations. It's not something we want to do continuously or - right now, for the most part, we do it once a year, but it's coming back to it and back to it. But at some point it's like beating a dead horse and people tend to tune you out if you're always asking for money”).

74. Noncommercial religious broadcasters are even differently situated from NPR and other CPB-qualified stations in that they do not receive public funding. Emert WDT ¶ 18. NewLife FM “receive[s] no funding from the Corporation for Public Broadcasting or any other government source.” Emert WDT ¶ 14; *accord* Henes WDT ¶¶ 11, 18; 5/21/15 Tr. 5268:10-12 (Henes) (observing that The Praise Network does not receive government funding as does public radio). Rather, Noncommercial Broadcasters not affiliated with NPR must depend entirely on the voluntary generosity of private individuals and other entities – primarily their listeners. The unavailability of public funding affects Noncommercial Broadcasters' willingness and ability to pay sound recording royalties.

75. Moreover, neither NewLife FM nor the Praise Network stations are affiliated with a college or university, which is true of most noncommercial religious broadcasters, so they cannot depend on that large institutional source of funding, either. *See generally* Emert WDT; Henes WDT ¶ 11.

C. NONCOMMERCIAL BROADCASTERS CANNOT PAY PROFITS TO OWNERS OR SHAREHOLDERS BUT MUST USE ALL FUNDS TO FURTHER THEIR EDUCATIONAL AND RELIGIOUS MISSION TO ENCOURAGE, EDUCATE, AND INSPIRE THEIR LISTENERS.

76. Just as Noncommercial Broadcasters are restricted in how they may raise funds, they also are restricted in how they may use the funds that they are able to raise. *See* 26 U.S.C. § 501(c)(3) (mandating that “no part of the net earnings of” a 501(c)(3) non-profit may “inure[] to the benefit of any private shareholder or individual”). As Mr. Henes testified, noncommercial religious stations “are non-profit organizations, so all broadcasting activities are directed at advancing religious, educational, charitable, or other non-profit goals rather than making an economic profit for the benefit of owners and investors.” Henes WDT ¶ 4. If there is any money left over after funding operations, it is used “to expand our ministry, our reach.” 5/21/15 Tr. 5268:13-16 (Henes). *See also* Emert WDT ¶ 36 (“[A]ny desire on our part to reach more listeners is driven by a desire to benefit them, not profit from them.”). Thus, as non-profit buyers, they would make very different decisions than commercial entities who seek to maximize profit.

D. AS BUYERS IN A COMPETITIVE MARKETPLACE, NONCOMMERCIAL BROADCASTERS WOULD NOT MAKE THE SAME DECISIONS AS COMMERCIAL ENTITIES.

77. All of these differences would certainly influence the behavior of Noncommercial Broadcasters as willing buyers in a competitive marketplace.

78. Any application of a commercial fee model to noncommercial licensees would not make sense. For example, the interactive service agreements reviewed by Professor Rubinfeld to arrive at his benchmark proposal are inapplicable to noncommercial licensees because they were entered into by buyers with completely different business models, sources of funding, and motivations. Professor Rubinfeld

agreed that he was not aware of “any market license agreements that would apply in the next rate period and could serve as potential benchmarks” for his rate proposal for the Noncommercial Broadcasters. 5/6/15 Tr. 2097:2-2098:11 (Rubinfeld). And SoundExchange has not proposed that noncommercial entities would agree as a “willing buyer” to a percentage of revenue metric. *Id.*

79. The best way to set an appropriate rate structure for noncommercial licensees is to look to any evidence specific to noncommercial licensees. Professor Rubinfeld agreed that an agreement entered into between SoundExchange and another noncommercial broadcaster participant sounded like it would be a “relevant market agreement” for the Judges to consider. 5/6/15 Tr. 2098:6-11 (Rubinfeld); *see infra* PFF Part V.B.1. Therefore, the Judges should look solely to the evidence presented by the noncommercial participants in this proceeding.

V. A TIERED AND CAPPED FLAT FEE STRUCTURE IS THE STRUCTURE THAT MOST WILLING NONCOMMERCIAL BUYERS AND WILLING SELLERS WOULD AGREE TO IN AN EFFECTIVELY COMPETITIVE MARKET.

80. A tiered and capped flat fee structure is by far the most appropriate rate structure for noncommercial webcasters, and that is what the NRBNMLC has proposed. Such a structure reflects the reality that licensee finances are not necessarily linked to music use or to listenership, and it provides for the least possible administrative burden for these organizations with sometimes limited resources. As shown below, it is critical that fees be both predictable and affordable. Moreover, numerous marketplace agreements and other reference points establish that tiered and capped flat fees at relatively modest levels for noncommercial broadcasters have been agreed to by both willing buyers and willing sellers and publicly endorsed by SoundExchange.

A. IT IS CRITICAL FOR NONCOMMERCIAL BROADCASTERS TO BE SUBJECT TO PREDICTABLE AND AFFORDABLE FEES GIVEN THEIR HEAVY RELIANCE ON VOLUNTARY LISTENER DONATIONS.

81. The most onerous part of the current CRB fee is the usage fee that applies once the minimum-fee limit has been reached. As explained below, a usage fee is not appropriate for noncommercial licensees. The rates can quickly add up once the usage fee kicks in. For example, at the 2015 published usage rate, a Noncommercial Broadcaster would pay over \$20,000 annually to simulcast 12 performances per hour to 300 average listeners.³

82. A usage fee should not be applied to Noncommercial Broadcasters because funding does not necessarily increase with audience size. Henes WDT ¶ 25 (“A significant increase in listenership might result in a few new donors, but a slight overall increase in donations would be insufficient to cover a large increase in costs.”). Unlike commercial stations, a larger streaming audience does not translate into larger revenues for Noncommercial Broadcasters in the form of higher rates for advertising time. Henes WDT ¶ 25. Instead, the stations must attract new donations. *Id.* “The idea of a fee that increases directly with listenership is a scary prospect for noncommercial broadcasters who rely on listener donations to support their operations.” Emert WDT ¶ 32. As Mr. Henes testified, “When our support does not increase in proportion with our listenership, it is fundamentally unfair that our expenses should do so.” Henes WDT ¶ 26.

83. A flat fee is the most appropriate metric for a licensee with very limited resources such as Noncommercial Broadcasters. Most noncommercial religious

³ \$20,325.63 = \$500 for 218 listeners + \$19,825.63 for 82 listeners (\$0.0023 / performance * 12 performances/hour * 24 hours/day * 365 days/year * 82 listeners).

broadcasters operate with very limited resources and budgets based largely on voluntary listener donations. They have no guarantees of funding from year to year and are bound by how much fundraising they can do without alienating their listenership. In addition, they are not supported by public funding, and most are not supported by funding from academic institutions. *See supra* Part IV.B. Thus, it is extremely important to noncommercial religious broadcasters that fees for streaming are both affordable and predictable – capped, modest flat fees with no usage fees rising with increased listenership. Emert WDT ¶ 31; Henes WDT ¶ 26.

84. Given the limited resources and limited fundraising means available to Noncommercial Broadcasters, it is vital that sound recording performance royalties be set at levels that Noncommercial Broadcasters are able to afford. As Mr. Henes testified, an increase in the rates that would result from listenership of 300 average listeners “would be devastating. [A broadcaster] would have to make a choice of whether to continue [streaming] or it would be a difficult situation to go back to listeners and continue to raise money for it, would be your only option. We don't have many options.” 5/21/15 Tr. 5270:9-5270:14 (Henes). “When a station’s budget is based largely on small donations from a large number of listeners, an expense doesn’t need to be that big to force a noncommercial station to cease operations, or at least cause a station to rethink whether it should continue to engage in activities that incur that expense.” Henes WDT ¶ 26.

85. Mr. Emert similarly testified that “[w]hile \$500 is an amount that NewLife FM is able to afford ..., if the fee increased much above this, or increased more directly with our streaming listenership levels, I believe that we would be forced to give serious consideration to discontinuing this service to our listeners.” Emert WDT ¶ 31.

He also testified that he had “encountered multiple noncommercial religious broadcasters who have decided not to stream because they are concerned about how high the SoundExchange fees would be under the current rates if they start.” Emert WDT ¶ 32.

86. It is also very important to Noncommercial Broadcasters that sound recording royalties be predictable. As Mr. Emert stated:

Flat fees are critically important to Noncommercial Broadcasters because they rely primarily on their listeners to support them and do not know at the beginning of the year how generous their listeners will be. NewLife FM relies on its listeners to meet nearly its entire operating budget, and it needs to know how much time it will have to divert from its core activities to sharathons and other fundraising efforts to attempt to raise the money it needs to continue its outreach.

Emert WDT ¶ 37. Mr. Henes similarly emphasized the importance of predictable fees:

Q. Is the predictability important to you?

A. Very much, so.

Q. Why is that?

A. I can budget for it. I can actually go to my listeners and present this is what it’s going to take, rather than an unexpected bump in a music fee if we have too many online listeners.

5/21/15 Tr. 5273:22-5274:3 (Henes).

87. These same needs of affordability and predictability are true for larger stations as well as smaller ones. As Mr. Emert testified, although such stations have more resources and listenership:

that only means that they are able to reach more people with their ministry, not that they should be treated like commercial entities.

... We do not do what we do to make money, and we certainly are not motivated to increase our audience by a profit motive. Instead, we provide a ministry to our listeners to enrich their lives and further our educational and spiritual missions, and any desire on our part to reach more listeners is driven by a desire to benefit them, not profit from them. Having to pay as

a commercial webcaster to meet these non-monetary goals simply does not make sense.

Emert WDT ¶¶ 35, 36. Mr. Henes agreed that:

Flat, predictable, and affordable fees are just as important to [larger Noncommercial Broadcasters] as to smaller broadcasters. They, like us, also depend on listener donations and underwriters to meet budgets: they also need to know their fundraising goals. Larger stations have larger ministries – their goal, like ours, is to help more people. They do not make profits to enrich owners or shareholders.

Henes WDT ¶ 27. “Noncommercial broadcasters are not suddenly disqualified from their non-profit status when they reach a certain size, nor can they sell advertising no matter how large their listenership grows.” Emert WDT ¶ 34.

88. Additional \$200 payment tiers for each 100 added listeners above the \$500 fee threshold, capped at \$1,500, are predictable and, most importantly, affordable. 5/21/15 Tr. 5272:10-5273:1 (Henes). Additional tiers likely would benefit record labels and artists as well. As Mr. Emert testified:

I believe that including these additional flat fee tiers will encourage stations that currently cap their listenership to avoid usage fees to remove – or at least raise – those caps in certain instances because a flat fee structure is much more affordable and predictable for them to pay. This may well lead many Noncommercial Broadcasters to pay SoundExchange more than the \$500 annual fee than those that do so now.

Emert WDT ¶ 41; *accord* Henes WDT ¶ 30. At the same time, the cap will “allow Noncommercial Broadcasters to expand listenership above current levels with certainty as to needed funding, without fear of costs spiraling out of control.” Henes WDT ¶ 30.

B. NUMEROUS MARKETPLACE AGREEMENTS AND OTHER REFERENCE POINTS ESTABLISH THAT A CAPPED, TIERED FLAT FEE STRUCTURE IS THE MOST APPROPRIATE RATE STRUCTURE FOR NONCOMMERCIAL BROADCASTERS.

89. In stark contrast to SoundExchange’s proposed rate structure, for which it presented no evidentiary support, multiple marketplace indicators – including two

agreements entered into by SoundExchange itself – confirm that a flat fee structure is what willing buyer Noncommercial Broadcasters and willing sellers would agree to.

1. SoundExchange’s Agreement With CBI Embodies A Flat Fee Structure.

90. On October 7, 2014, SoundExchange and CBI – an association of noncommercial broadcasters – notified the Judges that they had agreed to statutory rates and terms covering the 2016-2020 license period and requested that the Judges adopt those rates and terms to apply to all eligible noncommercial educational webcasters. *See* NRNBMLC Ex. 7034; 4/27/2015 Tr. 19:9-16 (counsel for CBI). That agreement embodies a flat fee structure. *Id.* Attach. at 2.

91. Neither of the two SoundExchange expert witnesses who discussed noncommercial rates was even aware that SoundExchange itself had entered into this agreement or that it sought to have the rates and terms in the agreement adopted to apply to all eligible noncommercial educational webcasters. 5/6/15 Tr. 2097:24-2098:5 (Rubinfeld); 5/29/15 Tr. 6740:19-25, 6741:12-16 (Lys). Professor Rubinfeld admitted that such an agreement “sounds like it would be relevant” to the rate determination for noncommercial webcasters more generally. 5/6/15 Tr. 2098:6-11 (Rubinfeld).

92. The SoundExchange-CBI agreement sets a flat annual fee of \$500 per station or channel for all eligible noncommercial educational webcasters. Among other eligibility criteria, noncommercial educational webcasters must stream to no more than 218 average monthly listeners (*i.e.*, no more than 159,140 monthly ATH) to be able to pay statutory royalties under these rates and terms. NRBNMLC Ex. 7034 Attach. at 2.

93. Notably, and unlike the current noncommercial educational rates, if a webcaster exceeds the specified ATH threshold in a given year, no usage fees apply

under the agreement. Rather, it is no longer eligible to pay statutory webcasting fees under these rates for that year; it must instead convert to the CRB-set rate structure and fees for noncommercial webcasters for that year. *Id.* Attach. at 3 (providing that when noncommercial educational webcaster exceeds ATH threshold, it must “for such month and the remainder of the calendar year in which such month occurs, pay royalties in accordance, and otherwise comply, with the provisions of Part 380 Subpart A applicable to noncommercial webcasters”). Indeed, the submitted redline of the SoundExchange-CBI agreement against the current noncommercial educational webcaster regulations shows that SoundExchange and CBI affirmatively chose to delete the usage fees that appear in the current regulations. *Id.* Attach. at 2.

94. After the year in which a noncommercial educational webcaster exceeds the listener threshold, it again is eligible to pay the \$500 flat fee, but it must affirmatively limit its webcasting going forward to ensure that it stays below the threshold. *See id.* Attach. at 2 (providing that webcaster must “[t]ake[] affirmative steps not to make total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station in any month, if in any previous calendar year it has made total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station in any month”).

95. Although the SoundExchange-CBI agreement includes the same listener threshold of 159,140 monthly ATH as appears in the current noncommercial educational webcaster regulations, that threshold cannot be read as an appropriate willing-buyer-willing-seller threshold that should be applied to noncommercial webcasters generally. CBI necessarily would only be incentivized to negotiate a threshold high enough so that

its member stations do not exceed it, and that is precisely what appears to have happened here. SoundExchange's own licensee payment information shows that of the 414, 480, and 506 noncommercial educational webcasters reflected in SoundExchange's payment data in license years 2011, 2012, and 2013, respectively, and excluding those who paid either \$600 or even multiples of \$500 (which are likely reporting proxy fees or fees for multiple channels rather than usage fees), not a single noncommercial educational webcaster paid usage fees. NAB Ex. 4141 at 38-43, 65-71, 94-100. Of the 482 noncommercial educational webcasters in 2014, a sole noncommercial educational webcaster made a one-time payment of [REDACTED] above the \$500 minimum fee, but this payment was not attributed to a particular month and may well have been a late fee rather than usage fees. NAB Ex. 4199 at 15-21; *id.* at 19.

96. Thus, the only significance of the ATH threshold specified in the SoundExchange-CBI is that it is apparently high enough to enable this class of noncommercial webcasters to stay below it.

97. While SoundExchange and CBI did not raise the minimum fee listener threshold, they did agree to raise a related listener threshold that determines a webcaster's eligibility to pay a \$100 fee in lieu of having to submit reports of sound recording usage to SoundExchange. *See* NRBNMLC Ex. 7034 Attach. at 5-6. Specifically, the parties agreed to raise the ATH cap under which noncommercial educational webcasters are exempt from reporting from 55,000 annual ATH to 80,000 annual ATH. *Id.* Thus, when a related ATH threshold did matter enough to CBI to negotiate to raise it from the current level, SoundExchange agreed to a 45% increase in that threshold, which presumably will

relieve more noncommercial educational webcasters from having to submit reports of use.

98. Both the flat fee structure adopted by CBI and SoundExchange and SoundExchange's willingness to raise the ATH threshold for exempting noncommercial educational webcasters from reporting requirements are informative regarding the rates and terms to which noncommercial willing buyers and willing sellers would agree.

2. SoundExchange's Agreement with NPR Embodies A Flat Fee Structure.

99. In addition to the SoundExchange-CBI agreement, SoundExchange agreed to noncommercial rates and terms with NPR and CPB as well. NRBNMLC Ex. 7024. Again, SoundExchange, NPR, and CPB jointly requested that the Judges adopt those rates and terms to apply to all NPR- and CPB-affiliated stations as statutory rates and terms for the 2016-2020 license period. *Id.* at 1. And again, that agreement embodies a flat fee structure.

100. SoundExchange and NPR/CPB agreed to an annual flat fee of \$560,000 (\$2,800,000 for the entire five-year license term) to cover the entire NPR/CPB network of hundreds of stations. 5/8/15 Tr. 2569:12-21 (Bender) (“[T]he Corporation for Public Broadcasting has literally hundreds of NPR stations around the country, but they choose to report in one statement of account.”).

101. The “Covered Entities” under the agreement include “NPR, American Public Media, Public Radio International, and Public Radio Exchange, and up to 530 Originating Public Radio Stations as named by CPB.” NRBNMLC Ex. 7024 Attach. at 7.

102. The number of channels covered by the agreement is actually much greater than 530, as the agreement covers all “Web Site Performances,” including performances on both radio simulcasts and Internet-only side channels, made on an “Authorized Web Site.” *Id.* at 7-8. “An ‘Authorized Web Site’ is any Web Site operated by or on behalf of any Covered Entity that is accessed by Web Site Users through a Uniform Resource Locator (‘URL’) owned by such Covered Entity and through which Web Site Performances are made by such Covered Entity.” NRBNMLC Ex. 7024 at 7-8. Moreover, an “Originating Public Radio Station” may make transmissions over multiple channels. For example, KING.ORG is a classical radio station affiliated with NPR,⁴ but it transmits five channels online. *See* <http://www.king.org/pages/18147149.php>? (“Classical KING FM has been streaming on the Internet since December 1995. Listen to any one of our five channels here.”).

103. The agreement also permits NPR/CPB to increase the number of Originating Public Radio Stations by paying an additional flat fee of “\$500 per Originating Public Radio Station per year.” NRBNMLC Ex. 7024 at 9.

104. NPR and CPB are supported by the federal government and thus have a source of funding not available to noncommercial religious broadcasters. *Emert WDT* ¶ 18; *Henes WDT* ¶ 11. Therefore, rates that NPR and CPB agreed to are likely significantly higher than those that would be agreed to by noncommercial religious broadcasters. Nonetheless, the flat fee structure adopted by NPR/CPB and

⁴ *See* www.npr.org/stations/pdf/nprstations.pdf. KING.ORG’s affiliation with NPR is the type of adjudicative fact of which the Judges should take judicial notice, as it “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” *Cf.* Fed. R. Evid. 201(b)(2).

SoundExchange sheds light on the rate structure to which noncommercial religious broadcaster willing buyers and willing sellers would agree.

105. Notably, the agreement includes a specified annual ATH allotment permitted under the agreement, but only “Music ATH” that include sound recording performances of musical works count toward the allotment. NRBNMLC Ex. 7024 at 7, 9. This provision is logical, as ATH without sound recordings subject to the statutory licenses at issue should not count toward ATH thresholds, and it supports the NRBNMLC’s request to make that commonsense principle clear in the regulations. *See infra* PFF Part VII.C.

3. Fees Set Under The Section 118 Statutory License For Noncommercial Broadcasters’ Performance Of Musical Works Embody A Flat Fee Structure.

106. Apart from the two recent flat-fee agreements that SoundExchange has reached with other classes of noncommercial broadcasters, the fees specified under the 17 U.S.C. § 118 statutory license that permits Noncommercial Broadcasters to perform musical works over the air have long followed a flat fee structure. *See* 37 C.F.R. § 381.6. For noncommercial religious broadcasters, they followed a tiered and capped flat fee structure. *See id.*

107. Flat fees have proven to be a workable and mutually agreeable way of compensating musical works copyright owners, and there is no reason to think that the owners of musical works copyrights and sound recording copyrights would differ in their willingness to accept a flat fee structure. This flat fee structure is workable for Noncommercial Broadcasters and is indicative of what willing buyers and sellers would agree to in a competitive market.

4. SoundExchange Has Supported A Flat Fee Structure For Noncommercial Broadcasters In Its Endorsement Of Legislation To Enact A Sound Recording Performance Right For Terrestrial Radio.

108. In addition to the flat fee rate structures discussed above, “SoundExchange itself has been willing to accept modest flat fees to cover sound recording performances by noncommercial broadcasters in its effort to seek legislation requiring radio broadcasters to pay for those performances over the air,” as Mr. Emert testified. Emert WDT ¶ 44. While NewLife FM (and, indeed, commercial and noncommercial broadcasters alike) strongly opposes the enactment of any such legislation given how actively and aggressively record labels and artists seek out airplay on its stations even in the absence of any direct royalty payment, *see supra* PFF Part III.C), Mr. Emert testifies that the proposed legislation nonetheless provides some indication of the rate structure and fee amounts that SoundExchange has proposed to accept for the same type of sound recording public performances as are at issue in this case – just over a different medium. Emert WDT ¶ 44.

109. The Performance Rights Act was introduced in 2009 and proposed to grant a sound recording “performance right applicable to radio transmissions generally.” NRBNMLC Ex. 7026 at 2. While the bill includes provisions that would relegate rate-setting for terrestrial radio to the Copyright Royalty Judges, it also sets flat fees for “public broadcasters,” which include noncommercial religious broadcasters.⁵ *Id.* at 8-9.

⁵ Qualifying entities include “public broadcasting entit[ies] as defined in section 118(f).” NRBNMLC Ex. 7026 at 8. Section 118(f), in turn, defines a “public broadcasting entity” as, *inter alia*, “a noncommercial educational broadcast station as defined in section 397 of title 47.” 17 U.S.C. § 118(f). And section 397 of title 47 defines a noncommercial educational broadcast station as, *inter alia*, a “radio broadcast station which (A) under the rules and regulations of the Commission in effect on November 2, 1978, is eligible to be licensed by the Commission as a noncommercial educational radio ... broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association.” 47 U.S.C. § 397(6) (emphasis added).

Those fees are \$500 per year for noncommercial broadcasters with annual gross receipts less than \$100,000 and \$1,000 per year for even the largest noncommercial broadcasters with annual gross receipts above that amount. *Id.*

110. SoundExchange strongly supported this proposed legislation, with its then-Executive Director, John Simson, calling it “a very rational, thought-through piece of legislation” and applauded it because “it ensures that small and non-commercial radio stations are protected.” NRBNMLC Ex. 7025. Mr. Emert reiterates his strong opposition to the bill but states:

I only refer to it to observe that if SoundExchange has been willing to accept no more than a \$1,000 annual flat fee from noncommercial broadcasters for performing sound recordings over their broadcast stations if such a right were granted, it is reasonable for SoundExchange to accept no more than a \$1,500 annual flat fee from noncommercial broadcasters for streamed sound recording performances, where listenership is far smaller.

Emert WDT ¶ 45.

111. SoundExchange again supported a flat fee structure when, just last April, similar new proposed legislation was introduced entitled the “Fair Play Fair Pay Act.” *See* H.R. 1733, 114th Cong. (2015), *available at* <https://www.congress.gov/bill/114th-congress/house-bill/1733/text?q=%7B%22search%22%3A%5B%22fair+pay+play%22%5D%7D>. Again, the proposed legislation sought to enact a sound recording performance right applicable to terrestrial radio. *Id.* § 2. In a provision entitled “Special Protection for Public Broadcasters, College Radio, and other Noncommercial Stations,” the bill proposed to set flat annual fees for noncommercial broadcasters, but this time the fee was only \$100 annually for all noncommercial stations regardless of size. *Id.* § 5(b). And again, SoundExchange strongly supported it, issuing a press release on its website. *See*

SoundExchange Applauds Fair Play Fair Pay Act Announcement, Apr. 13, 2015, available at <http://www.soundexchange.com/pr/soundexchange-applauds-fair-play-fair-pay-act-announcement/#sthash.oYztnkXL.dpuf>.⁶

112. SoundExchange’s strong support for these bills, which include annual flat fees for noncommercial broadcasters, indicates that SoundExchange is willing to treat noncommercial broadcasters differently and much more favorably than commercial entities and to license them under modest annual flat fees.

VI. SOUNDEXCHANGE’S RATE PROPOSAL FOR NONCOMMERCIAL WEBCASTERS SHOULD BE REJECTED FOR MULTIPLE REASONS.

113. SoundExchange has defaulted on providing any evidentiary support for its rate proposal applicable to Noncommercial Broadcasters. SoundExchange proposes to apply the same per-performance rates that it has proposed for commercial webcasters to noncommercial webcasters that exceed 218 average monthly listeners. Proposed Rates and Terms of SoundExchange, Inc. at 4. Below that threshold, SoundExchange proposes to apply a \$500 annual fee. *Id.* SoundExchange’s proposal is inappropriate because:

- (a) SoundExchange has failed to present any evidence to support it vis-à-vis noncommercial webcasters;
- (b) based on numerous grounds, the proposal is inappropriate for commercial webcasters and even more inappropriate for noncommercial webcasters; and
- (c) both noncommercial webcaster rate-setting history and noncommercial webcasters’ marketplace behavior that avoided commercial usage fees in droves confirm that commercial usage rates are unaffordable and unreasonable to impose upon noncommercial webcasters.

⁶ The NRBNMLC requests that the Judges take judicial notice of this more recent proposed legislation and SoundExchange’s support of it, as both facts “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” *Cf.* Fed. R. Evid. 201(b)(2).

A. SOUNDEXCHANGE PRESENTED NO EVIDENCE WHATSOEVER TO SUPPORT ITS NONCOMMERCIAL RATE PROPOSAL.

114. The only witness that SoundExchange presented to support its noncommercial proposal was Professor Rubinfeld, who provided no evidence at all. Professor Rubinfeld admitted that he was “not aware of any market license agreements that would apply in the next rate period that could serve as potential benchmarks” for noncommercial webcasters. Rubinfeld CWDT ¶¶ 33, 246; *accord* 5/6/15 Tr. 2097:19-23 (Rubinfeld). He “therefore propose[d] to continue the minimum fee of \$500 per station or channel, up to a maximum usage of 159,140 aggregate tuning hours,” and to apply commercial webcaster rates “to usage in excess of 159,140 per month,” or 218 average listeners. Rubinfeld CWDT ¶¶ 33, 246.⁷

115. Professor Rubinfeld’s sole support for proposing to apply exorbitant commercial usage rates to noncommercial webcasters was his belief that no one – or almost no one – would pay them. *See* Rubinfeld CWDT ¶¶ 33, 246 (“For most, if not all, non-commercial webcasters this \$500 minimum likely will be the only leg of the formula that applies because their monthly tuning hours will be below 159,140 hours.”). That is no evidence of a reasonable fee.

116. Similarly, Professor Rubinfeld’s sole support for an ATH monthly threshold of 159,140 for the 2016-2020 term was his belief that virtually no noncommercial webcasters would exceed that threshold. Rubinfeld CWDT ¶¶ 33, 246

⁷ To the extent that Professor Rubinfeld suggests that his proposal is merely a continuation of the status quo, it is not, as virtually no noncommercial webcasters are paying commercial usage rates under the CRB-set rates for noncommercial webcasters. *See* Peterson CWRT ¶ 20 n.29 (“The payment history of the noncommercial webcasters, however, indicates that Professor Rubinfeld’s proposal does not, in fact, continue the status quo.”); *infra* PFF Part VI.C.2.

(opining that “most, if not all,” noncommercial webcasters’ “monthly tuning hours will be below 159,140 hours”). Again, that is not evidence. Professor Rubinfeld cited no documents and presented no studies, listener surveys, economic analyses, or other evidence to support his noncommercial rate proposal. *See* Rubinfeld CWDT ¶¶ 33, 246. In other words, SoundExchange has not even attempted to put forth a rate proposal that accounts for the significant differences between noncommercial and commercial licensees. SoundExchange’s failure even to consider the differently situated noncommercial entities in formulating its fee proposal in and of itself constitutes grounds for rejection of that proposal’s applicability to noncommercial entities.

117. Nor did SoundExchange offer any evidence to support its noncommercial rate proposal on rebuttal, as it did not submit testimony from a single rebuttal witness who discussed that proposal. While Professor Lys criticized the NRBNMLC’s proposal, he said nothing about SoundExchange’s proposal. Lys WRT ¶¶ 355-58. Moreover, as became evident during his oral examination, Professor Lys was in no position to opine regarding noncommercial rates or to claim, as he did, that “listeners are likely to be indifferent as to whether their music is being streamed by a noncommercial or commercial webcaster.” Lys WRT ¶ 256. Specifically, Professor Lys:

- “do[es] not listen to religious broadcasts” (5/29/15 Tr. 6736:4-13 (Lys));
- admittedly is “not an expert regarding how noncommercial and commercial religious stations program or choose the programs that they provide on their simulcasts” (*id.* at 6737:17-21);
- did not “cite any documents to support the opinions that he” gave regarding the NRBNMLC’s rate proposal even though he identified 97 documents that he relied on for other aspects of his testimony (*id.* at 6737:22-6738:24; Lys WRT App. B);

- did not “rely on any conversations with any noncommercial religious radio simulcasters in reaching [his] opinions” regarding the NRBNMLC’s proposal (5/29/15 Tr. 6738:25-6739:3 (Lys));
- did not “rely on any conversations with any noncommercial religious radio broadcasters in reaching [his] opinions” regarding the NRBNMLC’s proposal (*id.* 6739:4-7);
- did not “rely on any surveys of listeners to noncommercial religious-themed radio broadcasters’ simulcasts to test whether listeners would be indifferent between noncommercial religious radio simulcasts and commercial religious simulcasts” (*id.* at 6739:8-14); and
- did not otherwise “rely on any other empirical analyses that would test whether listeners are indifferent between noncommercial and commercial religious programming” (*id.* at 6739:15-20).

118. Moreover, neither Professor Rubinfeld nor Professor Lys relied on a single agreement entered into by a noncommercial radio simulcaster. 5/29/15 Tr. 6739:21-6740:18 (Lys); Rubinfeld CWDT ¶¶ 33, 246 (“I am not aware of any market license agreements that would apply in the next rate period that could serve as potential benchmarks.”). Notably, neither one was even aware that SoundExchange had entered into a license agreement with CBI setting a \$500 flat per-station fee or that SoundExchange sought to have that flat fee adopted as the statutory fee applicable to all eligible noncommercial educational broadcasters. 5/6/15 Tr. 2097:24-2098:5 (Rubinfeld); 5/29/15 Tr. 6740:19-25, 6741:12-16 (Lys). Professor Rubinfeld admitted that such an agreement “sounds like it would be relevant” to the rate determination for noncommercial webcasters more generally. 5/6/15 Tr. 2098:6-11 (Rubinfeld).

119. Similarly, Professor Lys was unaware that SoundExchange had entered into a second noncommercial license agreement that it proposed to have adopted as the statutory fee applicable to those noncommercial webcasters that receive government funding and are affiliated with NPR and/or CPB. 5/29/15 Tr. 6741:17-6742:4 (Lys). He

was aware, however, that noncommercial webcasters have never paid the same sound recording rates as commercial webcasters at any time since the webcasting statutory license was created. 5/29/15 Tr. 6745:13-18 (Lys).

120. SoundExchange's failure to provide the Judges with any basis to adopt its rate proposal for noncommercial webcasters, coupled with the unawareness of its own experts regarding two recent license agreements that SoundExchange entered into with noncommercial webcasters and that adopt a flat fee structure, warrants rejection of SoundExchange's proposal.

B. SOUNDEXCHANGE'S PROPOSED USAGE FEES ARE BASED ON COMMERCIAL INTERACTIVE SERVICE AGREEMENTS THAT DO NOT SUPPORT A COMPETITIVE MARKET FEE FOR NON-INTERACTIVE WEBCASTERS, MUCH LESS FOR NONCOMMERCIAL BROADCASTERS.

121. SoundExchange's proposal to apply the same per-performance rates both to commercial webcasters and to noncommercial webcasters that stream to more than 218 average monthly listeners is particularly unfounded, as SoundExchange has failed to support the imposition of those usage rates even on commercial webcasters. Those proposed rates are based on a proffered benchmark analysis by Professor Rubinfeld of agreements entered into by commercial interactive music services and predominantly the three major record companies. *See* Rubinfeld CWDT Part V.A.

122. NAB has identified in its PFFCL a litany of flaws with Professor Rubinfeld's reliance on license agreements covering commercial interactive music services as his main basis for proposing rates for commercial non-interactive statutory services, including radio simulcasters. Specifically, Professor Rubinfeld:

- improperly relies on a proposed benchmark market that exhibits a marked lack of effective competition, where the repertoires of each of the three

major record labels are complementary “must haves” in order for an interactive music service to operate successfully;

- improperly assumes that the commercial statutory webcasting market has converged with the interactive services market when it has not, particularly with respect to simulcasting;
- invalidly assumes that license fees will constitute the same percentage of revenue for both interactive music services and noninteractive statutory services;
- does not properly account for advertising-supported services in performing his interactivity adjustment to derive his proposed rate for noninteractive services;
- relies on improper and biased weighting in developing his average performance rate in a way that systematically and significantly inflated his proposed license fee;
- fails to account for services’ non-license fee costs;
- does not properly account for differences in the promotional and substitutional effects of interactive music services on one hand and noninteractive statutory services on the other;
- does not properly account for the significantly less important role that sound recordings play in simulcast services as compared with interactive music services;
- underestimates the number of noncompensable plays in calculating his interactivity adjustment; and
- improperly relies on a survey by Professor McFadden that does not corroborate Professor Rubinfeld’s interactivity adjustment.

NAB PFFCL Part VIII.A. Noncommercial Broadcasters hereby incorporate Part VIII.A of NAB PFFCL as if fully set forth herein.

123. As inappropriate as Professor Rubinfeld’s reliance is on commercial interactive music service agreements to set rates for commercial statutory services, it is even more inappropriate as a basis to set usage rates for noncommercial statutory services, particularly Noncommercial Broadcasters. As previously mentioned, not one of

the agreements relied upon by Professor Rubinfeld in his benchmark proposal involved a noncommercial entity. *See supra* PFF Part VI.A; Rubinfeld CWDT ¶¶ 33, 246 (acknowledging unawareness “of any market license agreements that would apply in the next rate period that could serve as potential benchmarks” for noncommercial webcasters); *accord* 5/6/15 Tr. 2097:19-23 (Rubinfeld). Moreover, as discussed in Part IV above, Noncommercial Broadcasters fundamentally differ not only from commercial statutory webcasters but even from commercial broadcast simulcasters in ways that render a proposed benchmark based on commercial interactive music service agreements meaningless for Noncommercial Broadcasters. For these reasons – coupled with SoundExchange’s evidentiary default on providing a basis to support the application of its proposed commercial usage fees to noncommercial entities – SoundExchange’s proposed usage fees for Noncommercial Broadcasters and other noncommercial entities are inappropriate.

C. BOTH NONCOMMERCIAL WEBCASTER RATE-SETTING HISTORY AND NONCOMMERCIAL WEBCASTERS’ MARKETPLACE BEHAVIOR CONFIRM THAT COMMERCIAL USAGE RATES ARE UNAFFORDABLE AND INAPPROPRIATE TO IMPOSE UPON NONCOMMERCIAL WEBCASTERS.

1. After Commercial Usage Rates Were Applied For The First Time In 2007 To Noncommercial Webcasters Above A Certain Listener Threshold, Congress Stepped In To Allow The Parties To Negotiate Alternative Agreements.

124. From the creation of the nonsubscription webcasting statutory license on October 28, 1998 until 2006, the rates set by the CARP for Noncommercial Broadcasters were a constant \$.0002176 per performance, inclusive of the ephemeral royalty. *See Web I*, 67 Fed. Reg. at 45273 (setting rates for Oct. 28, 1998 through 2002); *Digital Performance Right in Sound Recordings and Ephemeral Recordings: Final Rule* 69 Fed.

Reg. 5693, 5702 (Feb. 6, 2004) (carrying forward noncommercial rates through 2004); Pub. L. No. 108-419, 118 Stat. 2341, 2370 (2004), *available at* <https://www.congress.gov/bill/108th-congress/house-bill/1417/text?overview=closed> (“The rates and terms in effect under section 114(f)(2) or 112(e) of title 17, United States Code, on December 31, 2004, for ... eligible nonsubscription services ... shall remain in effect until the later of the first applicable effective date for successor terms and rates specified in section 804(b) (2) or (3)(A) of title 17, United States Code, or such later date as the parties may agree or the Copyright Royalty Judges may establish.”).

125. The noncommercial radio simulcaster rate of \$.0002176 per performance, in place from October 28, 1998 until the beginning of 2006, was equal to approximately one-third of commercial radio simulcaster rates. *Web I*, 67 Fed. Reg. at 45258-59 (observing that “RIAA offered the noncommercial stations a rate that corresponds to 1/3 the rate to be paid by commercial broadcasters” and that the CARP “adopted the RIAA proposal for radio retransmissions” and affirming CARP rate). Even with this 2/3 discount, Congress enacted the Small Webcaster Settlement Act (“SWSA”) in 2002 to respond to fee concerns expressed by noncommercial and small webcasters and to enable the parties to negotiate alternative agreements at lower rates than those set by the CARP, which noncommercial broadcasters did. *See* Small Webcaster Settlement Act of 2002, Pub. L. 107-321, 116 Stat. 2780 (2002); *Notification of Agreement Under the Small Webcaster Settlement Act of 2002*, 68 Fed. Reg. 35008, 35008-09 (June 11, 2003).

126. It was not until 2006 that commercial webcaster usage rates were imposed on noncommercial webcasters after they hit a monthly listener threshold of 218 average listeners. *See Web II*, 72 Fed. Reg. at 24111. The rate determination drastically

increased noncommercial webcaster usage rates from a constant \$0.0002176 per performance to rapidly increasing per-performance rates of \$0.0008, \$0.0011, \$0.0014, \$0.0018, \$0.0019 for years 2006-2010, respectively. *Id.*

127. Following adoption of these rates, Congress again stepped in to enact legislation that enabled parties to negotiate alternative agreements at lower rates than those set by the CRB for years through 2015. *See* Webcaster Settlement Act of 2008, Pub. L. No. 110-435, 122 Stat. 4974 (2008), *available at* <https://www.congress.gov/bill/110th-congress/house-bill/7084/text?q=%7B%22search%22%3A%5B%22webcaster%22%5D%7D>; Webcaster Settlement Act of 2009, Pub. L. No. 111-36, 123 Stat. 1926 (2009), <https://www.congress.gov/bill/111th-congress/house-bill/2344/text?q=%7B%22search%22%3A%5B%22webcaster%22%5D%7D>.

128. Faced with this dramatic fee increase, noncommercial broadcasters accepted rates offered by SoundExchange for performances above the 218 average listener threshold that carried forward the \$0.0002176 per performance rate for years 2006-2010 and set rates for 2011-2015 equal to 1/3 the commercial broadcaster rates that SoundExchange had separately negotiated with NAB in another agreement executed under the WSA. *Compare* SX Ex. 124-013 (NAB WSA broadcaster rates) *with* SX Ex. 121-008 (noncommercial WSA rates).

129. The NRBNMLC does not discuss this context or mention the noncommercial WSA rates because they believe that those rates are in any way an appropriate basis for establishing noncommercial fees in this proceeding. As discussed in PFF Part V, *supra*, tiered and capped flat fees at modest levels – rather than usage rates –

are much more appropriate to apply to Noncommercial Broadcasters. Moreover, while the noncommercial webcaster WSA usage rates represent a 2/3 discount from commercial usage rates, they are still much too high, as noncommercial webcasters affirmatively limit their streaming listenership to avoid paying such usage fees. *See supra* Part I.C. And apart from their inappropriateness as a benchmark, those rates are nonprecedential, and the NRBNMLC does not offer them as evidence of reasonable rates. *See* 17 U.S.C. § 114(f)(5)(C); SX Ex. 124.

130. Noncommercial Broadcasters recount this noncommercial rate-setting history merely to demonstrate that applying commercial usage rates to noncommercial webcasters who exceed the 218 monthly listener threshold was so problematic that even Congress stepped in to allow parties to negotiate alternate agreements.

2. The Commercial Usage Fees Are So Onerous For Noncommercial Webcasters That Virtually No One Paid Them During The Current Term, And Those That Did Early In The Term Took Measures That Avoided Them Thereafter.

131. As discussed above in Part VI.C.2, *supra*, noncommercial webcasters' actual marketplace behavior demonstrates that the vast majority of them not only would not willingly agree to pay commercial webcaster usage rates but are not willing to webcast at all under such rates. The evidence shows that usage fees are so high that noncommercial webcasters have been taking affirmative steps to cap their listenership so as not to exceed the ATH threshold. Even noncommercial webcasters that did exceed the threshold in early years took measures that avoided paying them in later years, either by switching to an alternative rate structure or dialing back their listenership to stay below (or in one case near) the threshold for the remainder of the term. Moreover, SoundExchange is wrong to claim that usage fees don't matter. About 25 noncommercial

webcasters do pay usage fees – and some are quite significant – but they do so under an alternative rate structure with much lower rates. 5/6/15 Tr. 2099:21-2100:2 (Rubinfeld); *see also* NAB Ex. 4141 at 45-47, 73-76, 102-04; NAB Ex. 4199 at 25-28.

132. In 2011, for example, out of 809 total noncommercial webcasters reflected in SoundExchange’s licensee payment data, 553 paid royalties under rate structures that required payment of commercial usage fees above the ATH threshold – *i.e.*, those paying the CRB-set noncommercial webcaster rates and noncommercial educational webcasters. NAB Ex. 4141 at 38-48. Of these 553, only 13 paid more than the \$500 annual minimum fee per station or channel. NAB Ex. 4141 at 38-41, 44. And of these 13, fully 9 paid either \$600 or an even multiple of \$500, which suggests that these webcasters were paying either the noncommercial educational webcaster \$100 reporting proxy fee or paying for multiple stations. *Id.* Thus, only 4 noncommercial webcasters at most out of a total of 809 paid usage fees at commercial webcaster rates as opposed to an alternative rate structure.

133. In 2012 (again excluding those webcasters that paid either \$600 or an even multiple of \$500), none of the 911 total noncommercial webcasters paid commercial usage fees. NAB Ex. 4141 at 65-77; Peterson CWRT ¶ 20. In 2013, only a single noncommercial webcaster out of 932 total noncommercial webcasters made a one-time payment of [REDACTED] above the minimum fee under the CRB-set rates. NAB Ex. 4141 at 94-105; Peterson CWRT ¶ 20. Given that the entire payment was made in a single month of the year and no other payments are reflected, it is not clear whether this fee reflects a late fee or usage fees.

134. In 2014, out of a total of 998 noncommercial webcasters, only a single noncommercial educational webcaster made a one-time payment of [REDACTED] above the minimum fee, and a single noncommercial webcaster paying CRB-set rates made a one-time payment of [REDACTED] above the minimum fee. NAB Ex. 4199 at 15-28; *id.* at 19, 24. Neither of these payments was allocated to a particular month. *Id.* Given the relatively modest amounts of each of these payments and their inclusion in the “Total” column rather than in a particular month of 2014, they may have been late fees rather than usage fees. Professor Rubinfeld said that he “would expect that would be the case” that “there are no noncommercial services that are currently paying the CRB set commercial rate for performances that exceed the monthly ATH threshold.” 5/6/15 Tr. 2099:2-7 (Rubinfeld).

135. By contrast, 17, 27, 25, and 22 noncommercial webcasters each made payments above the minimum fee in 2011, 2012, 2013, and 2014, respectively, under the alternative noncommercial webcaster WSA (NCW-WSA) rates, which set usage fees at one-third of the commercial broadcaster usage rates. NAB Ex. 4141 at 45-47, 73-76, 102-04; NAB Ex. 4199 at 25-28; *see* 5/4/15 Tr. 1702:2-6 (Blackburn); *see* SX Ex. 124-13; Peterson CWRT ¶ 20 (“[A]most all of the somewhat larger noncommercial webcasters pay usage rates that are available under a Webcaster Settlement Act agreement and are a fraction of the commercial usage rates.”); 5/21/15 Tr. 5269:2-18 (Henes) (testifying that “[a]t the current [noncommercial WSA] agreement, if we would go over the 218 [average listener threshold], we would owe – it’s a per-play fee that we would have to pay,” which is set at “one third of the commercial rate”). Many of these payments have been significant – *i.e.*, tens of thousands of dollars or more. NAB Ex.

4141 at 45-47, 73-76, 102-04; NAB Ex. 4199 at 25-28; *see also* 5/8/15 Tr. 2580:19-23 (Bender) (agreeing that “some noncommercial WSA licensees pay tens of thousands of dollars in usage fees”). Professor Rubinfeld acknowledged that he was aware “that there are about 25 to 30 noncommercial licensees that do pay usage fees but they pay them at a rate that is substantially below the commercial rate.” 5/6/15 Tr. 2099:21-2100:2 (Rubinfeld).

136. These noncommercial payment patterns can be observed from SoundExchange’s licensee fee data, which tracks four categories of noncommercial licensees:

- (1) noncommercial webcasters paying under the noncommercial webcaster rates set by the CRB, where usage fees equal commercial usage fees (“NCW-CRB”);
- (2) noncommercial educational webcasters paying under noncommercial educational webcaster rates that are set forth in both CRB regulations and a noncommercial educational webcaster WSA agreement, where usage fees equal commercial usage fees (“NCEDW”);
- (3) noncommercial webcasters paying under the noncommercial webcaster WSA agreement other than microcasters, where usage fees are one-third of the commercial broadcaster usage fees (“NCW-WSA”); and
- (4) noncommercial microcasters that also pay under the noncommercial webcaster WSA agreement but whose listenership is too small for usage fees to kick in (“NC-MICRO”).

The following chart illustrates these payment patterns:

NONCOMMERCIAL LICENSEE COUNTS: 2011-2014**2011**

	<=\$500 Minimum Fee	\$600 or Multiple of \$500	Others Above Minimum Fee	Total
NCW-CRB	133	2	4	139
NCEDW	407	7	0	414
NCW-WSA	173	1	17	191
NC-MICRO	64	1	0	65
Total	777	11	21	809

2012

	<=\$500 Minimum Fee	\$600 or Multiple of \$500	Others Above Minimum Fee	Total
NCW-CRB	160	0	0	160
NCEDW	474	6	0	480
NCW-WSA	160	0	27	187
NC-MICRO	84	0	0	84
Total	878	6	27	911

2013

	<=\$500 Minimum Fee	\$600 or Multiple of \$500	Others Above Minimum Fee	Total
NCW-CRB	158	0	1	159
NCEDW	505	1	0	506
NCW-WSA	135	0	25	160
NC-MICRO	105	2	0	107
Total	903	3	26	932

2014

	<=\$500 Minimum Fee	\$600 or Multiple of \$500	Others Above Minimum Fee	Total
NCW-CRB	161	0	1	162
NCEDW	481	0	1	482
NCW-WSA	201	0	22	223
NC-MICRO	131	0	0	131
Total	974	0	24	998

NAB Ex. 4141 at 38-48, 65-77, 94-105; NAB Ex. 4199 at 15-28.

137. The marketplace behavior over time of the four noncommercial webcasters that, according to SoundExchange’s licensee payment data, did pay usage fees in 2011 at the CRB-set commercial rates (“NCW-CRB” licensees) powerfully confirms the inappropriateness of applying commercial usage rates to noncommercial entities. Those 4 licensees are:

- [[REDACTED]], which paid [[REDACTED]] (NAB Ex. 4141 at 44);
- [[REDACTED]], which paid [[REDACTED]] (*id.*);
- [[REDACTED]], which paid [[REDACTED]] (*id.*); and
- [[REDACTED]], which paid [[REDACTED]] (*id.*).

138. The two [[REDACTED]] stations stopped paying SoundExchange at the CRB-set rates for noncommercial webcasters after 2011. *See* NAB Ex. 4141 at 71-73, 100-02 (reflecting no separate [[REDACTED]] payments to SoundExchange at the NCW-CRB rates for 2012 or 2013); NAB Ex. 4199 at 23-25 (reflecting no [[REDACTED]] payments to SoundExchange under the NCW-CRB rate category for 2014). Moreover, the [[REDACTED]] and [[REDACTED]] payment amounts in 2011 themselves reflect significant payment reductions from 2010, where [[REDACTED]] paid [[REDACTED]], and [[REDACTED]] paid [[REDACTED]]. NAB Ex. 4141 at 14. [[REDACTED]] now appears to be affiliated with NPR, which pays a fixed flat fee of \$480,000 for all stations and channels across its entire network for each year from 2011-2015. *See* List of NPR Stations (June 2013), www.npr.org/stations/pdf/nprstations.pdf (listing [[REDACTED]] as an NPR station)⁸; NAB Ex. 4141 at 35, 63, 92; NAB Ex. 4199 at 13; 5/8/15 Tr. 2576:11-22 (Bender)

⁸ The NRBNMLC requests that the Judges take judicial notice of [[REDACTED]] affiliation with NPR.

(agreeing that NPR “has hundreds of licensees” and “pays one flat fee” of \$480,000 per year “to cover all those licensees”); SX-Ex. 124-007 through -009. These significant payment reductions over time as well as [[REDACTED]] conversion to an NPR-affiliated station establish that two of the four licensees at most that paid CRB-set commercial usage fees in 2011 were not willing to do so in any subsequent year, but instead took themselves out of the NCW-CRB rate category altogether.

139. [[REDACTED]] similarly took measures that largely enabled it to avoid paying commercial usage rates. After paying a total of [[REDACTED]] in 2011, [[REDACTED]] reduced its stream listenership dramatically, which reduced its SoundExchange royalties by over [[REDACTED]] such that it paid only [[REDACTED]] in 2012. NAB Ex. 4141 at 72. In 2013, it paid [[REDACTED]] – only [[REDACTED]] over the minimum fee – and in 2014, it again paid only [[REDACTED]]. NAB Ex. 4141 at 101; NAB Ex. 4199 at 24.

140. [[REDACTED]] also took measures that avoided paying commercial usage rates pursuant to the NCW-CRB rate structure. After paying [[REDACTED]] in 2011, [[REDACTED]] reduced its streaming below the ATH threshold in each year from 2012 to 2014, resulting in fee liability to SoundExchange of only the [[REDACTED]]. NAB Ex. 4141 at 44, 72, 101; NAB Ex. 4199 at 24.

141. To summarize, virtually none of the hundreds of noncommercial webcasting licensees paid commercial usage fees under the “NCW-CRB” rate structure. Moreover, the tiny handful that did in the first year of the current license term took measures that eliminated these fees in all subsequent years of the license term for which

payment information was provided. While these licensees paid over \$50,000 in NCW-CRB commercial usage fees in 2011 (\$52,756.55 - \$2,000 in minimum fees), they paid less than 10% of that amount – only [REDACTED] – for all three years of 2012-2014 combined, in a single 2012 payment by a single webcaster. Noncommercial licensees’ overwhelming rejection of having to pay commercial usage fees – both by limiting their stream listenership and by transferring to another noncommercial rate structure altogether – establishes that noncommercial webcaster buyers are not remotely willing to agree to pay the same usage fees as commercial webcasters.

VII. THE NRBNMLC’S RATE PROPOSAL

A. TIERED AND CAPPED FLAT FEES SHOULD BE ADOPTED.

142. Based on the foregoing analysis of the record evidence, the NRBNMLC proposes a per-station flat royalty fee for noncommercial simulcasting as follows.

143. Noncommercial webcasters should pay a flat annual fee of \$500 to stream to up to 400 average annual concurrent listeners to programming that includes sound recording performances subject to the statutory licenses. The NRBNMLC proposes to increase the number of average listeners permitted under the \$500 fee from the current 218 average listener level to 400 because the current threshold (159,140 monthly ATH) for Noncommercial Broadcasters has been in the regulations since 2006 and is based on listening levels of certain noncommercial streaming stations in 2004. *Web II*, 72 Fed. Reg. at 24099 (“[T]he latest available data on what might constitute a typical NPR streaming station consists of a survey of NPR stations undertaken in 2004. According to that survey, the NPR stations averaged 218 simultaneous streaming listeners per stations (or the equivalent of 159,140 ATH per month” (citation omitted)); *see also* Emert WDT ¶ 39. As Joseph Emert testified, “it is reasonable for Noncommercial Broadcasters to be

given some ‘breathing room’ given that 10 years will have passed by the time that the rates set in this proceeding go into effect in 2016.” Emert WDT ¶ 40.

144. SoundExchange itself agreed to increase the ATH threshold for determining eligibility for exemption from sound recording reporting requirements in its recent agreement with CBI given the passage of time. NRBNMLC Ex. 7034 at 2 & Attach. at 5-6 (observing that the SoundExchange-CBI agreement “somewhat increase[es] the listenership cap for services electing the proxy reporting option” from 55,000 to 80,000 annual ATH).

145. Above that listenership, the NRBNMLC proposes that noncommercial webcasters pay an additional \$200 for each additional 100 average listeners, up to a cap of \$1500 per station or channel, which would cover 900 average listeners and above. A tiered and capped flat fee structure is what noncommercial willing buyers would agree to with willing sellers, and it will keep sound recording digital performance royalties both predictable and affordable, which is critical for noncommercial broadcasters. *See supra* PFF Part V.A. It also is supported by numerous marketplace agreements and other reference points. *See supra* PFF Part V.B. Including these additional flat fee tiers may lead stations to start streaming and/or lift current listener caps, resulting in more money flowing to record labels and artists, while preventing costs from “spiraling out of control.” Henes WDT ¶ 30 (testifying that adding payment tiers capped at \$1,500 “would help other stations of which I am aware that approach this threshold and have decided to limit their online audience to avoid usage fees as well as those stations that exceed the threshold”).

146. The tiered fee structure with a \$1,500 cap also is generally supported by the current section 118 tiered and capped flat fees for musical work public performances by Noncommercial Broadcasters. As Mr. Emert testified:

In 2016, combined ASCAP, BMI, and SESAC fees range from \$1,486 per station for smaller market stations to \$13,163 for stations in the largest markets in the United States. In other words, no matter how large a station's terrestrial audience becomes, it will not owe more than \$13,163 [in] copyright fees for performing music compositions.

Emert WDT ¶ 43. For more talk-intensive stations that still play some music, the fees are capped at a maximum of \$4,607 annually. 37 C.F.R. § 381.6.

147. Noncommercial Broadcasters' core focus is their terrestrial broadcast operations, and broadcast audiences are much larger than online audiences. *See* Emert WDT ¶ 42 (“[O]ur broadcast audience is exponentially larger than our streaming audience”); Henes WDT ¶ 30. License “fee amounts set for broadcast radio would vastly exceed what would be appropriate for noncommercial streaming.” Emert WDT ¶ 42. Mr. Emert further testified:

Given that streaming audiences are highly likely to be a tiny fraction of the parallel broadcast audiences, and even recognizing that the right to perform musical compositions is different from the right to perform sound recordings, these amounts are far above where I believe reasonable fees for streaming sound recordings should be set.

Emert WDT ¶ 43. “[T]he NRBNMLC’s proposed \$1,500 cap compares favorably for copyright owners given the vast difference in audience sizes.” *Id.* ¶ 43.

B. THE ATH THRESHOLDS SHOULD BE ANNUALIZED INSTEAD OF CALCULATED ON A MONTHLY BASIS.

148. The NRBNMLC also proposes annual, rather than monthly, ATH thresholds. As Mr. Emert testified:

Calculating ATH annually is easier to administer with tiered flat fees based on listenership, as each fee threshold may be crossed only once,

rather than up to 12 times, during the course of the year. It also will allow Noncommercial Broadcasters to preserve unused ATH from month to month, balancing out unpredictable spikes in listening, while still streaming to no more than the average number of listeners permitted by the threshold on an annual basis.

Emert WDT ¶ 40.

C. THE ATH DEFINITION SHOULD MAKE CLEAR THAT ONLY ATH INCLUDING SOUND RECORDINGS SUBJECT TO THE STATUTORY LICENSES AT ISSUE ARE INCLUDED IN DETERMINING WHETHER APPLICABLE LISTENER THRESHOLDS ARE MET.

149. The NRBNMLC proposes to amend the current definition of “aggregate tuning hours” (“ATH”) to make clear that programs that do not include copyrighted sound recordings, such as talk and teaching programs, do not count in determining ATH for a particular period. As both Mr. Emert and Mr. Henes testified, it does not make sense for record companies to benefit from programming that does not include any of their content. Emert ¶ 46; Henes WDT ¶ 31. As Mr. Emert observed, “NewLife FM transmits many hours of talk programming, and [he] do[es] not think that it is reasonable for this programming to count toward meeting these [ATH] thresholds when NewLife FM receives no value from its statutory license payment for program segments that do not include sound recordings.” Emert WDT ¶ 46. Similarly, Mr. Henes aptly testified at trial that the proposal “would separate the tuning hours to music as opposed to – like our station, half of our programs is programs, teaching and talk programs. Why would we want to pay a music fee for those programs?” 5/21/15 Tr. 5273:5-5273:9 (Henes). This is especially true where a religious noncommercial broadcaster, such as NewLife FM, has peak streaming listenership when it is transmitting teaching and talk programming.

Emert WDT ¶ 46.

150. The SoundExchange-NPR agreement supports a definition for ATH that excludes listener hours that do not include sound recordings. That agreement specifies an annual ATH allotment, but only “Music ATH” that include sound recording performances of musical works count toward the allotment. NRBNMLC Ex. 7024 at 7, 9.

D. EPHEMERAL COPIES

151. There is no dispute between SoundExchange and the NRBNMLC regarding how the royalties for the ephemeral recording statutory license specified in 17 U.S.C. § 112(e) should be set. Both participants propose that those royalties for ephemeral reproductions used solely to facilitate transmissions made pursuant to the 17 U.S.C. § 114(f) statutory license be deemed to be “included within, and constitute 5% of,” the section 114(f) statutory license payments made by a particular service. *See* NRBNMLC’s Proposed Rates and Terms at 3 (Oct. 7, 2014); SoundExchange’ Proposed Rates and Terms at 5 and Attach. at 4 (Oct. 7, 2014) (proposed § 380.3(c)).

152. SoundExchange, however, has proposed language that may limit the scope of the ephemeral reproduction license to reproductions made “solely to facilitate transmissions for which it pays royalties.” *Id.* (emphasis added). The statutory language, however, does not refer to payment of royalties but merely requires that the reproductions be:

used solely for the transmitting organization’s own transmissions originating in the United States under a statutory license in accordance with section 114(f) or the limitation on exclusive rights specified by section 114(d)(1)(C)(iv).

17 U.S.C. § 112(e)(1)(B) (emphasis added).

153. The NRBNMLC, by contrast, has proposed to require that the reproductions be:

used solely by the Noncommercial Webcaster to facilitate transmissions made pursuant to 17 U.S.C. 114 as and when provided in this section [specifying royalty rates].

NRBNMLC's Proposed Rates and Terms at 3 (emphasis added).

154. Although SoundExchange's proposal tracks language in the current fee regulation found in 37 C.F.R. § 380.3(c), the NRBNMLC believes that its proposed language more closely tracks the section 112(e) statutory provision itself. It therefore requests that the Judges adopt its proposed language.

VIII. THE TERMS PROPOSED BY THE NRBNMLC AND NAB SHOULD BE ADOPTED, AND SOUNDEXCHANGE'S CONFLICTING PROPOSALS SHOULD BE REJECTED.

A. COMMON TERMS PROPOSED BY BOTH THE NRBNMLC AND NAB SHOULD BE ADOPTED.

155. The NRBNMLC and NAB have proposed a number of terms that would prevail in a hypothetical effectively competitive market, such as:

- (1) Maintaining the CPA requirement (*compare* NAB Proposed Rates and Terms § 380 (June 19, 2015) ("NAB Rates and Terms") *with* The NRBNMLC's Proposed Noncommercial Webcaster Rates and Terms § 380.__ (June 19, 2015) ("NRBNMLC Rates and Terms") (definition of "Qualified Auditor"));
- (2) Maintaining the time for payment of royalties due at 45 days (*compare* NAB Rates and Terms § 380.13(c) *with* NRBNMLC Rates and Terms § 380.__(c) (Terms for making payment of royalty fees and statements of account; Monthly payments));
- (3) Clarifying the definition of "Aggregate Tuning Hours" to exclude any discrete programming segments and any half hours of programming that do not include any Performances (*compare* NAB Rates and Terms § 380.11 *with* NRBNMLC Rates and Terms § 380.__ (definition of "Aggregate Tuning Hours"));

- (4) Clarifying that in the event the Licensee’s payment and statement of account are late, only a single late fee shall be assessed, at the interest rate established by 26 U.S.C. § 6621 (compare NAB Rates and Terms § 380.13(e) with NRBNMLC Rates and Terms § 380.__(e) (Terms for making payment of royalty fees and statements of account; Late fees));
- (5) Allowing Noncommercial Webcasters to recover overpayments (compare NAB Rates and Terms § 380.13(e) with NRBNMLC Rates and Terms § 380.__(i) (Terms for making payment of royalty fees and statements of account; Overpayments));
- (6) Excluding from the definition of Performance under the regulations: (a) a performance of a sound recording that is 15 seconds or less in duration; and (b) a second connection to the same sound recording from someone from the same IP address (compare NAB Rates and Terms § 380.11 (Definitions) with NRBNMLC Rates and Terms § 380.__(definition of “Performance”)); and
- (7) Adding a notice and cure provision (compare NAB Rates and Terms § 380.18 with NRBNMLC Rates and Terms § 380.__(Notice and Cure)).

156. NAB has supported these terms in its Proposed Findings and Conclusions and demonstrated why they should be adopted and SoundExchange’s competing terms should be rejected. *See* NAB PFFCL Part X. The NRBNMLC hereby incorporates by reference Part X of NAB PFFCL as if fully set forth herein.

B. SOUNDEXCHANGE SHOULD BE REQUIRED TO SEND EMAIL REMINDERS TO LICENSEES REGARDING PAYMENTS DUE AS WELL AS AUTOMATED ACKNOWLEDGMENTS WHEN PAYMENTS ARE MADE.

157. The NRBNMLC is requesting that the Copyright Royalty Judges require SoundExchange to send a once-yearly automated email reminder where a noncommercial licensee has previously provided its email address to SoundExchange on a statement of account or other form, at least one month before the annual minimum fee payment is due. It is typical in a business relationship for suppliers to send invoices informing payees of

the payment due date. The three musical works collectives, ASCAP, SESAC and BMI, all follow this practice. As Mr. Emert testified:

This greatly assists us in keeping track of the bills that we need to pay. I understand that SoundExchange administers a public statutory license rather than a private license between individual parties, but so do ASCAP, BMI, and SESAC for NewLife FM's broadcasting operations. Each of these three organizations sends NewLife FM annual invoices to remind us of the payments that we owe them.

Emert WDT ¶ 47; *accord* Henes WDT ¶ 32 (“We have very limited staffing and budget to keep track of such payment deadlines. ASCAP, BMI, and SESAC send annual invoices to remind us of the payments that we owe them, and it is reasonable to require SoundExchange to adhere to this established norm.”).

158. The NRBNMLC also proposes that SoundExchange be required to send an email acknowledging receipt of a royalty payment. Again, this is standard practice in the business world, even for non-profit organizations. Emert WDT ¶ 48 (“Any non-profit organization to whom we send funds, for any reason, always sends an official receipt back.”). Lack of a paper trail leads to issues where SoundExchange “loses” a payment, forcing noncommercial stations with limited staff to expend time and effort to prove payment. Henes WDT ¶ 33. This has already happened at least three times with The Praise Network, where SoundExchange “complain[ed] that a waiver fee had not been received.” *Id.* SoundExchange “later acknowledged its error after [The Praise Network] expended time and effort in order to prove that [it] had made the payment.” *Id.* Requiring SoundExchange to acknowledge payments at the time those payments are made would greatly alleviate this problem and enable both SoundExchange and licensees to refer easily to these acknowledgments in addressing questions regarding whether payments were sent. Lack of a follow up receipt, particularly in the absence of an

invoice, also may cause an issue for us in the areas of annual financial reviews or audits. Emert WDT ¶ 48.

159. Mr. Bender also testified that SoundExchange plans to launch an online payment portal “soon” and the portal will “acknowledge confirmation” of payments. *Id.* This planned impending launch shows that even SoundExchange believes that improvements in the payment structure are needed. Moreover, neither of these requirements would appear to cause an extreme burden to SoundExchange. Mr. Bender acknowledges that, “SoundExchange already sends annual reminders to all services that pay the minimum fee so long as the service has provided us with accurate contact information ... as a matter of course.” Bender WRT at 8-9. Requiring SoundExchange to do something it already says it does will not unreasonably burden SoundExchange.⁹

PROPOSED CONCLUSIONS OF LAW

I. HISTORY OF THE SOUND RECORDING PERFORMANCE RIGHT FOR NONCOMMERCIAL BROADCASTERS

A. HISTORY OF THE SOUND RECORDING PERFORMANCE RIGHT

160. Rates in this proceeding should be set with an eye toward the context in which the sound recording performance right arose and the underlying constitutional and congressional purpose for which copyright law exists, which shed light on the competitive market value of that right. NAB recounts this history and context in detail in

⁹ The requirements regarding the information that webcasters must report about the sound recordings that they transmit are being addressed in a separate rulemaking proceeding. *See Notice and Recordkeeping for Use of Sound Recordings Under Statutory License: Notice of Proposed Rulemaking*, 79 Fed. Reg. 25038 (May 2, 2014). The Judges should carefully consider the limited resources and funding for noncommercial broadcasters in the context of that rulemaking. Henes WDT ¶ 34 (discussing onerous nature of proposed reporting requirements); Emert WDT ¶ 49 (same). It is particularly reasonable to provide significant relief to noncommercial broadcasters from these requirements.

its PFFCL, and the NRBNMLC hereby incorporates NAB PFFCL Part XI.A as if fully set forth herein.

B. HISTORY OF RADIO'S RELATIONSHIP WITH THE SOUND RECORDING RIGHT

161. As discussed in greater detail by NAB, one of the principal reasons for Congress's reluctance to grant increased copyright protection to sound recordings was a deep concern for the dangers of disrupting the mutually beneficial relationship between radio broadcasters and the recording industry. As Noncommercial Broadcasters are all radio stations, these congressional decisions have impacted them directly. NRBNMLC hereby incorporates NAB PFFCL Part XI.A as if fully set forth herein.

II. THE APPLICABLE LEGAL STANDARD: THE RATES AND TERMS THAT MOST WILLING BUYERS WOULD PAY MOST WILLING SELLERS IN AN EFFECTIVELY COMPETITIVE MARKETPLACE

A. THE REQUIREMENT OF AN EFFECTIVELY COMPETITIVE MARKETPLACE

162. Perhaps the most fundamental rate-setting principle that the Judges must apply is the requirement that the rates and terms to be set be those that would prevail in a hypothetical effectively competitive marketplace. Based on the history of the statutory standard and relevant court cases, it is clear that this is one of the most important and non-negotiable factors for the Judges to consider, and NAB discusses it at length in its PFFCL. The NRBNMLC hereby incorporates NAB PFFCL Part XI.B as if fully set forth herein.

B. THE STATUTORY LICENSE REQUIRES THE JUDGES TO DISTINGUISH AMONG DIFFERENT TYPES OF SERVICES, AND NONCOMMERCIAL BROADCASTERS UNIFORMLY HAVE BEEN GIVEN PREFERENTIAL TREATMENT BY BOTH CONGRESS AND THE JUDGES.

163. The section 114 statutory license mandates that the rates and terms set by the Copyright Royalty Judges “shall distinguish among the different types of eligible nonsubscription transmission services then in operation.” 17 U.S.C. § 114(f)(2)(B) (emphasis added). This is not a permissive request, but an affirmative obligation.

164. The clearest evidence of whether Congress intended noncommercial broadcasters to be considered one of these “different types” of services is Congress’ consistently different – and preferential – treatment of noncommercial broadcasters as compared with commercial services, as discussed below.

1. Congress Consistently and Repeatedly Has Made Clear that Noncommercial Broadcasters Are To Be Given Favored Status.

a. The Public Broadcasting Act

165. Congress has a long history of providing special treatment to noncommercial broadcasting stations. As far back as 1967, Congress enacted the Public Broadcasting Act, legislation specifically intended to benefit and encourage noncommercial broadcasters, as distinct from commercial ones. *See* 47 U.S.C. § 390 (stating that the objectives of the legislation were, among other things, to “extend delivery of public telecommunications services to as many citizens of the United States as possible by the most efficient and economical means, including the use of broadcast and nonbroadcast technologies,” and to “strengthen the capability of existing public television and radio stations to provide public telecommunications services to the public”). This law provides Noncommercial Broadcasters with federal grants for

telecommunications facilities that are unavailable to commercial broadcasters. *See, e.g.*, 47 U.S.C. § 392. Those objectives are just as applicable today as they were nearly 40 years ago.

b. The Section 118 License

166. Similarly, as part of the 1976 overhaul of the Copyright Act, a new statutory license was added for Noncommercial Broadcasters to use copyrighted works, including musical works. *See* 17 U.S.C. § 118; 37 C.F.R. §§ 253.1-253.11. This license works much like the Sections 112 and 114 licenses at issue in this proceeding; that is, if the parties cannot reach a voluntary agreement on the royalty rate, it will be determined by the Copyright Royalty Judges (or, in previous incarnations of the statute, the Copyright Royalty Tribunal or a CARP). The House Judiciary Committee Report for this statute stated:

The Committee is cognizant of the intent of Congress, in enacting the Public Broadcasting Act on November 7, 1967, that encouragement and support of noncommercial broadcasting is in the public interest. It is also aware that public broadcasting may encounter problems not confronted by commercial broadcasting enterprises, due to such factors as the special nature of programming, repeated use of programs, and, of course, limited financial resources. Thus, the Committee determined that the nature of public broadcasting does warrant special treatment in certain areas.

H.R. Rep. No. 94-1476, at 117 (1976) (Conf. Rep.). Thus, specifically in the context of copyright licensing, Congress chose to confer a particular benefit on Noncommercial Broadcasters due to their non-profit missions, unique programming, and limited finances.

167. Both the House Judiciary Committee Report and the Senate Judiciary Committee Report dispute the notion that section 118 affords Noncommercial Broadcasters a subsidy rather than a reduced rate that reflects their ability to pay. S. Rep. 94-473, at 101 (1975); H.R. Rep. No. 94-1476, at 118. Regardless of nomenclature,

Congress recognized the need for a statutory license and independent rate-setting mechanism that would enable Noncommercial Broadcasters to broadcast copyrighted musical works at reasonable and affordable rates, those ensuring that Noncommercial Broadcasters can continue to provide socially desirable programming.

168. While it is important to protect musical copyrights, it is similarly desirable to ensure that broadcasters have access to content according to their ability to pay. In section 118, Congress chose to encourage and support Noncommercial Broadcasters, thus enabling them to pay for music royalties and expanding the scope of the programming available to the public. H.R. Rep. No. 94-1476, at 117. The decision of Congress to create a flexible framework dependent on ability to pay was a deliberate choice to support the programming decisions of noncommercial broadcasting.

**c. The Small Webcaster Settlement Act And
Subsequent Webcaster Settlement Acts**

169. Congress has continued its special treatment of noncommercial entities in the context of the very right at issue in this proceeding: the right of digital public performance of sound recordings. In 2002, it enacted the Small Webcaster Settlement Act (“SWSA”) in response to the outcry from smaller noncommercial webcasters who could not afford to pay the rates set by the CARP in *Web I*. Small Webcaster Settlement Act of 2002, Pub. L. 107-321, 116 Stat. 2780 (2002). Surely motivated by the same economic and public interest reasons as it was in 1967 and 1976, Congress enabled noncommercial and other licensees with the ability to negotiate lower sound recording royalty rates than those established in *Web I* – even though the noncommercial broadcaster rate itself was 2/3 lower than the commercial rate set in that proceeding. *Id.*

170. Congress again enacted two iterations of similar legislation following the issuance of the Judges' royalty determination in *Web II* that again enabled noncommercial and other small licensees to negotiate with SoundExchange more favorable rates than those that the Copyright Royalty Judges had set – even though again, the Judges set more favorable rates for noncommercial webcasters than for commercial entities. See Webcaster Settlement Act of 2008, Pub. L. No. 110-435, 122 Stat. 4974 (2008), available at <https://www.congress.gov/bill/110th-congress/house-bill/7084/text?q=%7B%22search%22%3A%5B%22webcaster%22%5D%7D>; Webcaster Settlement Act of 2009, Pub. L. No. 111-36, 123 Stat. 1926 (2009), <https://www.congress.gov/bill/111th-congress/house-bill/2344/text?q=%7B%22search%22%3A%5B%22webcaster%22%5D%7D>. That legislation enabled agreement to cover not only the *Web II* 2006-2010 but the *Web III* 2011-2015 period as well. See 17 U.S.C. § 114(f)(5)(A) (authorizing agreements to cover “a period of not more than 11 years beginning on January 1, 2005”).

171. Congress's longstanding and consistent preferential treatment of noncommercial entities speaks volumes about the meaning behind its directive in section 114 to establish different rates for different types of webcasters. It makes little sense to suppose that Congress would specifically want noncommercial entities to enjoy benefits for their transmission facilities, their broadcast of musical works, and their use of sound recordings in Internet simulcasts, but did not intend them to be one of the “different types” of services that it commanded the Judges to consider separately.

2. The Copyright Royalty Judges And The CARPs Consistently Have Set Different – And Lower – License Fees For Noncommercial Entities.

172. This rate-setting body and its predecessor CARP similarly have accorded Noncommercial Broadcasters preferential treatment in every webcasting rate-setting proceeding to date.

a. *Web I*

173. Since the advent of the digital performance right in sound recordings, Noncommercial Broadcasters have always enjoyed a separate royalty rate for this right. The first CARP that set Section 112 and 114 rates for nonsubscription webcasters for the period from October 28, 1998 through 2002 – the first period for which royalties for digital public performances of sound recordings were due – specifically found that “[a]pplying the same commercial broadcaster rate to noncommercial entities affronts common sense.” CARP Report at 89 (Feb. 20, 2002). The CARP set noncommercial rates for noncommercial broadcasters that were 2/3 lower than the rates applicable to commercial entities.

b. *Web II And Web III*

174. In the first webcasting rate proceeding conducted by the Copyright Royalty Judges, covering the 2006-2010 term and known as “*Web II*,” the Judges similarly set different – and lower – rates applicable to noncommercial webcasters than were available to commercial entities. *See Web II*, 72 Fed. Reg. at 24111. Those rates enabled noncommercial webcasters to stream to up to 218 listeners for a \$500 flat annual fee; thereafter, usage fees applied. *See Web II*, 72 Fed. Reg. at 24111.

175. The *Web III* determination covering 2011-2015 resulted in similar noncommercial rates, under a similar structure, that were different – and lower – than

commercial rates, as they again enabled noncommercial webcasters to stream to up to 218 average monthly listeners for a flat annual \$500 fee before much higher usage fees applied. *See Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings: Final Rule and Order*, Docket No. 2009–1 CRB, 79 Fed. Reg. 23102, 23128 (Apr. 25, 2014). Significantly, as discussed elsewhere in these PFFCL, virtually no noncommercial entities have been paying these CRB-set usage fees.

c. The Section 118 CARP Proceeding

176. In addition to the sound recording rate-setting proceedings that provided more favorable treatment to noncommercial entities than to commercial entities, the CARP in a prior musical works rate-setting proceeding for Noncommercial Broadcasters under 17 U.S.C. 118 expressly rejected the efforts of ASCAP and BMI to equate public broadcasting fees with commercial fees. Repeatedly, the CARP made clear its view that “commercial license rates can not appropriately be used as a benchmark to determine Public Broadcasters’ rates.” Report of the Copyright Royalty Arbitration Panel, Docket No. 96-6 CARP-NCBRA at 30 (July 22, 1998) (hereinafter, “Section 118 CARP Report”); *see also id.* at 20, 23-24. It is therefore well-established that in all past CARP proceedings, separate, lower, rates were set for noncommercial entities.

177. In the section 118 proceeding, the musical work performing rights organizations argued that Noncommercial Broadcasters appeared similar to commercial broadcasters, claiming that it “is patent to even a casual observer” that they had become commercialized. Section 118 CARP Report at 24 (citing ASCAP’s and BMI’s Proposed Finding of Facts and Conclusions of Law). The CARP acknowledged the observation; however, it found that “significant differences remain which render the commercial

benchmark suspect – particularly with respect to the manner in which broadcasters raise revenues.” *Id.*

178. Like it is today, the ability of the non-commercial broadcasters to raise revenue was the significant difference. The CARP noted the differences in the sources of income, namely that “commercial broadcasters generate their revenues through the sale of advertising while [non-commercial broadcasters] derive their income through a variety of sources including corporate underwriting, Congressional appropriations and viewer contributions.” Section 118 CARP Report at 24.

179. With respect to comparing underwriting to advertising, the CARP described the comparison a “superficial” resemblance. Section 118 CARP Report at 24. The CARP based its conclusions on the differences in the economics between commercial broadcasters and noncommercial broadcasters:

In the commercial context, audience share and advertising revenues are directly proportional and also tend to rise as programming costs rise – increased costs are passed through to the advertisers. No comparable mechanism exists for [non-commercial] broadcasters. Increased programming costs are not automatically accommodated through market forces. Contributions from government, business and viewers remain voluntary.

Id. (internal citation omitted). As described above, these same conditions exist today for Noncommercial Broadcasters and stand un rebutted.

III. UNDER THE GOVERNING LEGAL STANDARD, NONCOMMERCIAL BROADCASTERS CONSTITUTE A DIFFERENT TYPE OF SERVICE THAT WOULD AGREE WITH WILLING SELLERS TO A DIFFERENT RATE STRUCTURE AND LOWER RATES IN AN EFFECTIVELY COMPETITIVE MARKET.

180. Noncommercial Broadcasters fundamentally differ from commercial services and thus are one of the “different types of eligible nonsubscription transmission

services” referred to in 17 U.S.C. § 114(f)(2)(B) for whom a separate rate should be set.

See supra PFF Part II.

181. Noncommercial Broadcasters differ from statutory music services that only transmit their programming online in that they are terrestrial radio stations that simulcast their terrestrial broadcasts online. As such:

- their actual and intended online listeners are their local, over-the-air listeners, whom they can reach without having to pay sound recording royalties; this exerts downward pressure on the rates that they are willing to pay; and
- they build and maintain strong ties to the communities they serve, which fosters listener loyalty to the broadcasters for reasons unrelated to music; and
- they transmit a wide variety of non-music programming, including talk and teaching programs, deejay curation and other talk, local and national news, and community events announcements, so sound recordings play a much less important programmatic role than they do for Internet-only music services.

For these reasons, Noncommercial Broadcasters’ decisions as willing buyers in a competitive marketplace for sound recording public performance licenses would be different than those of Internet-only webcasters in ways that would drive down the price of those licenses. *See supra* PFF Part III.

182. Noncommercial Broadcasters also differ from commercial statutory licensees, including even terrestrial radio broadcasters, in ways that further support a different rate structure and lower rates for Noncommercial Broadcasters. Specifically, Noncommercial Broadcasters:

- are non-profit organizations that advance educational, religious, charitable, or other non-profit purposes;
- are limited in the ways in which they can fund their operations, in that they cannot – and do not – sell advertising or include it in their simulcasts but must largely rely on voluntary listener donations; and

- do not profit from the funds that they receive but use them to serve their listeners and further their non-profit mission.

For these reasons, Noncommercial Broadcasters' decisions as willing buyers in a competitive marketplace for sound recording public performance licenses would be different than those of commercial webcasters in ways that would further drive down the price of those licenses. *See supra* PFF Part IV.

183. NRBNMLC-affiliated stations differ from NPR and CPB-affiliated stations in that they cannot rely on government funding, which exerts further downward pressure on the rates that they would be willing to pay even from the rates that NPR and CPB would be willing to pay. *See supra* PFF Part IV.B.

IV. THE CURRENT NONCOMMERCIAL WEBCASTER RATES EXCEED WHAT NONCOMMERCIAL BROADCASTER BUYERS WOULD AGREE TO PAY RECORD LABELS IN A COMPETITIVE MARKET.

184. The current noncommercial webcaster rates set forth in the regulations do not constitute a valid basis for setting rates for Noncommercial Broadcasters for the 2016-2020 license term. Virtually no Noncommercial Broadcasters have paid the usage rates published in the regulations, and those Noncommercial Broadcasters that did pay those rates early in the current license term avoided them in later years. Noncommercial Broadcasters that have exceeded the specified ATH cap have instead paid for usage under an alternative set of rates specified in the noncommercial webcaster WSA Agreement, and some Noncommercial Broadcasters purposely limit their stream listenership to avoid paying usage rates under any available set of noncommercial webcaster rates. For these reasons, the current noncommercial rates published in the regulations – particularly the published usage rates – exceed what Noncommercial Broadcaster buyers would agree to

pay record companies in an effectively competitive marketplace. *See supra* PFF Part VI.C.2.

185. SoundExchange's proposed noncommercial rates are even higher on an absolute basis than the current rates and thus do not provide a valid basis for noncommercial webcaster rates for 2016-2020. SoundExchange presented no evidence to support its proposal and ignored multiple marketplace agreements and other reference points – including its own agreements with CBI and NPR/CPB – that demonstrate that a flat fee structure is the structure that most noncommercial buyers would agree to with willing sellers in an effectively competitive market. Its proposed usage rates for noncommercial webcasters were derived from license agreements covering commercial interactive services and do not provide an appropriate benchmark for noncommercial webcasters for multiple reasons. *See supra* PFF Part VI.B.

186. The noncommercial rates set forth in the noncommercial WSA agreement also exceed what Noncommercial Broadcaster buyers would agree to pay record companies in an effectively competitive marketplace and do not – and cannot – provide a valid basis for setting rates for the 2016-2020 license term. Although many more Noncommercial Broadcasters have paid usage fees under this set of rates, as a percentage of all noncommercial webcasters, the proportion is small. Despite the availability of these rates, some noncommercial webcasters have limited their stream listenership to avoid paying usage fees under any set of rates. For these reasons, the current noncommercial rates published in the regulations – particularly the published usage rates – exceed what Noncommercial Broadcaster buyers would agree to pay record companies in an effectively competitive marketplace. *See supra* PFF Part I.C.

V. UNDER THE APPLICABLE LEGAL STANDARD, THE TIERED AND CAPPED FLAT FEE STRUCTURE THAT THE NRBNMLC HAS PROPOSED BEST REFLECTS WHAT NONCOMMERCIAL SIMULCASTER BUYERS WOULD AGREE TO WITH SELLERS IN A COMPETITIVE MARKET.

187. A tiered and capped flat fee structure is the most appropriate fee metric for Noncommercial Broadcasters because:

- Noncommercial Broadcasters advance non-profit educational, religious, or other charitable missions and do not operate for personal gain;
- Noncommercial Broadcasters primarily depend on the generosity of their listeners to support their operation, and they do not know from year to year how generous their listeners will be; predictable and affordable fees are critical;
- the funds that Noncommercial Broadcasters do receive do not benefit private individuals but are used to further Noncommercial Broadcasters' educational and religious missions; higher royalties directly impede Noncommercial Broadcasters' ability to serve their listeners; and
- a flat fee structure is supported by two noncommercial marketplace agreements that SoundExchange itself negotiated with CBI and NPR/CPB, which SoundExchange proposes to apply to entire classes of noncommercial broadcasters;
- the section 118 royalties covering the public performance of musical works by Noncommercial Broadcasters over their terrestrial radio stations follow a capped and tiered flat fee structure;
- SoundExchange has publicly expressed support for a bill that would grant a sound recording public performance right applicable to terrestrial radio but that includes relatively modest tiered and capped flat fees for noncommercial broadcasters (\$500 and \$1000 depending on station receipts) to give those broadcasters preferential treatment; and
- SoundExchange does not dispute that a flat fee is appropriate for some noncommercial webcasters, as it has proposed a flat fee for those webcasters that stream to no more than 218 average listeners per month.

See supra PFF Parts V, VII.A.

188. A percent of revenue metric is not appropriate for noncommercial webcasters. *See* 5/6/15 Tr. 2097:15-18 (Rubinfeld) (“Q. You don’t propose to apply a

percentage-of-revenue-based fee to noncommercial webcasters, do you? A. I do not.”); *supra* PFF Part IV.D.

189. The Judges are required by 17 U.S.C. § 114(f)(2)(B)(i) to consider the promotional or substitutional effect of a service on record companies’ sound recording sales and other streams of revenue when setting royalty rates. The significant promotional value of simulcasting to record companies and artists points toward a lower sound recording performance royalty. *See* 17 U.S.C. § 114(f)(2)(B)(i); *supra* PFF Part III.C.

190. Under the legal standard set forth in 17 U.S.C. § 114(f)(2)(B), the flat fees and rate structure proposed by the NRBNMLC most accurately reflect what willing noncommercial religious licensees would pay willing sellers in an effectively competitive market. *See supra* PFF Part V.

VI. UNDER THE APPLICABLE LEGAL STANDARD, THE NRBNMLC’S AND NAB’S TERMS – NOT SOUNDEXCHANGE’S – ARE THE TERMS THAT WOULD PREVAIL IN A COMPETITIVE MARKETPLACE.

191. In a hypothetical effectively competitive market, the NRBNMLC’s proposed terms would prevail. The marketplace shows that licensees and licensors issue invoices and acknowledge payments received. *Supra* PFF Part VIII.B. Moreover, Noncommercial Broadcasters would not agree to provide the burdensome detail on all sound recordings played that SoundExchange has requested, particularly considering the significantly lower amounts of royalties that are collected and distributed from these entities. *See supra* n. 10.

192. The Terms jointly proposed by NAB and the NRBNMLC and discussed in NAB’s findings are reasonable, and the conflicting terms proposed by SoundExchange are not. *See supra* PFF Part VIII.

Respectfully submitted,

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June 24, 2015

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2015, I caused copies of the foregoing document to be served via email on the following parties, which have consented to email service:

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The NRBNMLC's Proposed Noncommercial Webcaster Rates and Terms (June 19, 2015)

37 C.F.R. § Part 380 Subpart XX
(Rates and Terms Applicable to Noncommercial Webcasters)¹

§ 380. __ General.

(a) Scope. This subpart establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions made by or on behalf of Noncommercial Webcasters as set forth herein in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by or on behalf of Noncommercial Webcasters as set forth herein in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2016, through December 31, 2020.

(b) Legal compliance. Noncommercial Webcasters relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections, the rates and terms of this subpart, and any other applicable regulations not inconsistent with the rates and terms set forth herein.

(c) Relationship to voluntary agreements. Notwithstanding the royalty rates and terms established in this subpart, the rates and terms of any license agreements entered into by Copyright Owners and digital audio services shall apply in lieu of the rates and terms of this subpart to transmission within the scope of such agreements.

§ 380. __ Definitions.

For purposes of this subpart, the following definitions shall apply:

Aggregate Tuning Hours means the total hours of programming transmitted by or on behalf of a Noncommercial Webcaster during the relevant period to all listeners within the United States of eligible digital transmissions from a single AM or FM radio station or single channel. In computing Aggregate Tuning Hours, a Noncommercial Webcaster may exclude any discrete programming segments and any half-hours of programming that do not include any Performance. By way of example, if a service transmitted one hour of programming containing Performances to 10 simultaneous listeners, the service's Aggregate Tuning Hours would equal 10. If one half-hour of that hour did not include any Performance, the Noncommercial Webcaster's Aggregate Tuning Hours would equal 5. As an additional example, if one listener listened to a service for 10 hours and all 10 hours contained Performances, the service's Aggregate Tuning Hours would equal 10.

¹ The National Religious Broadcasters Noncommercial Music License Committee ("NRBNMLC") is aware that the National Association of Broadcasters ("NAB") is participating in the Copyright Royalty Judges' separate rulemaking on notice and recordkeeping (including reports of use). Docket No. 14-CRB-0005 (RM). The NRBNMLC understands that to be the proceeding in which the Judges are considering notice and recordkeeping issues. Therefore, the NRBNMLC does not address such issues in this proceeding or in these proposed rates and terms. The NRBNMLC's position on notice and recordkeeping issues and its proposed regulations is generally consistent with those set forth in the Joint Comments of the National Association of Broadcasters and the Radio Music License Committee Regarding the Copyright Royalty Judges' Notice and Recordkeeping Rulemaking, filed on June 30, 2014, and those parties' Joint Reply Comments in that same rulemaking, filed on September 5, 2014.

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges.

Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114(f).

Ephemeral Recording is a phonorecord created for the purpose of facilitating an Eligible Transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114(f), and subject to the limitations specified in 17 U.S.C. 112(e).

Licensee is a person that has obtained a statutory license under 17 U.S.C. 114, and the implementing regulations, to make eligible nonsubscription transmissions, or noninteractive digital audio transmissions as part of a new subscription service (as defined in 17 U.S.C. 114(j)(8)) other than a Service as defined in § 383.2(h) of this chapter, or that has obtained a statutory license under 17 U.S.C. 112(e), and the implementing regulations, to make Ephemeral Recordings for use in facilitating such transmissions.

Noncommercial Webcaster is a Licensee that makes eligible digital audio transmissions and

(1) Is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501),

(2) Has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted, or

(3) Is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.

Performance is each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission but excluding the following:

(1) A performance of a sound recording that does not require a license under the United States Copyright Act, 17 U.S.C. §§ 101, et. seq. (e.g., a sound recording fixed before February 15, 1972);

(2) A performance of a sound recording for which the Noncommercial Webcaster has previously obtained a license from the Copyright Owner of such sound recording;

(3) An incidental performance that both:

(i) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events, and

(ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song); and

(4) A performance of a sound recording that is 15 seconds or less in duration; or

(5) A second connection to the same sound recording from someone from the same IP address.

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

Qualified Auditor is a Certified Public Accountant licensed in the jurisdiction where it seeks to conduct a verification.

§ 380. Royalty fees for the public performance of sound recordings and for ephemeral recordings.

(a) Royalty rates. Royalty rates and fees for eligible digital transmissions of sound recordings made pursuant to 17 U.S.C. 114, and the making of ephemeral recordings pursuant to 17 U.S.C. 112(e) are as follows:

(i) For all digital audio transmissions totaling not more than 3,504,000 Aggregate Tuning Hours (ATH) annually, (*i.e.*, 400 average concurrent listeners annually (400 listeners * 24 hours/day * 365 days/year = 3,504,000)), including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, and related Ephemeral Recordings, a Noncommercial Webcaster will pay an annual per channel or per station performance royalty of \$500 in 2016, 2017, 2018, 2019, and 2020.

(ii) A Noncommercial Webcaster will pay an additional \$200 per year for each 876,000 Aggregate Tuning Hours (ATH) (*i.e.*, 100 average concurrent listeners (100 listeners * 24 hours/day * 365 days/year = 876,000)), of digital audio transmissions made by the Noncommercial Webcaster for digital audio transmissions totaling in excess of the base 3,504,000 Aggregate Tuning Hours (ATH) provided for in subsection (a)(1), above; provided, however, that a Noncommercial Webcaster shall not pay more than \$1,500 per annum in total for any station or channel.

(b) Ephemeral royalty. The royalty payable under 17 U.S.C. 112(e) for any reproduction of a phonorecord made by a Noncommercial Webcaster during this license period and used solely by the Noncommercial Webcaster to facilitate transmissions made pursuant to 17 U.S.C. 114 as and when provided in this section is deemed to be included within, and constitute 5% of, such royalty payments.

(c) Minimum fee. Each Noncommercial Webcaster will pay an annual, nonrefundable minimum fee of \$500 for each calendar year or part of a calendar year of the period 2016-2020 during which it is a Licensee pursuant to 17 U.S.C. 112(e) or 114. This annual minimum fee is payable for each individual channel and each individual station maintained by Noncommercial Webcasters. For each such Noncommercial Webcaster, the annual minimum fee described in

this paragraph (c)(2) shall constitute the minimum fees due under both 17 U.S.C. 112(e)(4) and 114(f)(2)(B). Upon payment of the minimum fee, the Noncommercial Webcaster will receive a credit in the amount of the minimum fee against any additional royalty fees payable in the same calendar year, including those fees payable pursuant to §380__(a). The Collective shall issue reminder notices to Noncommercial Webcasters by electronic mail at least one month before the annual minimum fee payment is due.

§ 380.___ Terms for making payment of royalty fees and statements of account.

(a) Payment to the Collective. A Noncommercial Webcaster shall make the royalty payments due under §380.___ to the Collective.

(b) Designation of the Collective. (1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Noncommercial Webcasters due under §380.___ and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) and 114(g).

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in paragraph (b)(2) of this section, such representatives shall file a petition with the Copyright Royalty Board designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized such Collective.

(ii) The Copyright Royalty Judges shall publish in the Federal Register within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) Monthly payments. Noncommercial Webcasters must make monthly payments where required by §380.___, and provide statements of account, for each month on the 45th day following the month in which the Eligible Transmissions subject to the payments and statements of account were made. All monthly payments shall be rounded to the nearest cent. The Collective shall acknowledge receipt of each payment made by a Noncommercial Webcaster by sending an e-mail to the Noncommercial Webcaster within one business day of receiving any payment.

(d) Minimum payments. A Noncommercial Webcaster shall make any minimum payment due under §380.___(b) by January 31 of the applicable calendar year, except that payment by a Noncommercial Webcaster that was not making Eligible Transmissions or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) as of

said date but begins doing so thereafter shall be due by the 45th day after the end of the month in which the Noncommercial Webcaster commences to do so.

(e) Late fees. A Noncommercial Webcaster shall pay a late fee for each instance in which any payment or any statement of account is not received by the Collective in compliance with applicable regulations by the due date. The amount of the late fee shall be the underpayment rate identified in 26 U.S.C. § 6621 applied to the amount of the late payment or the payment associated with a late statement of account. The late fee shall accrue from the due date of the payment or statement of account until the payment and statement of account are received by the Collective, provided that, in the case of a timely provided but noncompliant statement of account, the Collective has notified the Noncommercial Webcaster within 90 days regarding any noncompliance that is reasonably evident to the Collective. A single late fee shall be due in the event both a payment and statement of account are received by the Collective after the due date, regardless of whether they are received on the same date or different dates. SoundExchange may compromise or elect to forego the late fee in the case of minor or inadvertent failures of a Noncommercial Webcaster to make a timely payment or submit a timely statement.

(f) Statements of account. Any payment due under §380.____ shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

- (1) Such information as is necessary to calculate the accompanying royalty payment;
- (2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address (if any) and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;
- (3) The signature of:
 - (i) The owner of the Noncommercial Webcaster or a duly authorized agent of the owner, if the Noncommercial Webcaster is not a partnership or corporation;
 - (ii) A partner or delegee, if the Noncommercial Webcaster is a partnership; or
 - (iii) An officer of the corporation, if the Noncommercial Webcaster is a corporation.
- (4) The printed or typewritten name of the person signing the statement of account;
- (5) The date of signature;
- (6) If the Noncommercial Webcaster is a partnership or corporation, the title or official position held in the partnership or corporation by the person signing the statement of account;
- (7) A certification of the capacity of the person signing; and
- (8) A statement to the following effect:

I, the undersigned owner or agent of the Noncommercial Webcaster, or officer or partner, have examined this statement of account and hereby state that it fairly presents, in all material respects, the liabilities of Noncommercial Webcaster pursuant to 17 U.S.C. 112(e) and 114.

This attestation shall not prevent a Noncommercial Webcaster from making good faith revisions or adjustments to its Statements of Account that it later determines to be necessary to accurately reflect its liabilities due under this Subpart.

(g) Distribution of royalties. (1) The Collective shall promptly distribute royalties received from Noncommercial Webcasters to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify and pay the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Noncommercial Webcaster equally based upon information provided under the report of use requirements for Noncommercial Webcasters contained in § 370.4 of this chapter and this subpart, except that in the case of Noncommercial Webcasters exempt from the report of use requirements contained in § 370.4 of this chapter, the Collective shall distribute royalties based on proxy usage data in accordance with a methodology adopted by the Collective's Board of Directors. The Collective shall use its best efforts to identify and locate copyright owners and featured artists in order to distribute royalties payable to them under section 112(e) or 114(d)(2) of title 17, United States Code, or both. Such efforts shall include searches in Copyright Office public records and published directories of sound recording copyright owners.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (h) of this section within 5 years from the date the Collective first distributes any other royalties for the same reporting period, then such distribution may be first applied to the costs directly attributable to the administration of that distribution. The foregoing shall apply notwithstanding the common law or statutes of any State.

(h) Retention of records. Books and records of a Noncommercial Webcaster and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

(i) Overpayments. If the Noncommercial Webcaster determines, within three (3) calendar years of paying to the Collective a monthly amount due, that the Noncommercial Webcaster overpaid the royalty payments due under § 380.__, the Noncommercial Webcaster may reduce the royalty payments due on its next monthly payment(s) by the amount of the overpayment, until the full amount of the overpayment has been recouped. The Noncommercial Webcaster shall include in its statement of account for each month in which it is deducting amounts to recover an overpayment such information as is necessary to calculate the amount of the overpayment.

§ 380.__ Confidential Information.

(a) Definition. For purposes of this subpart, "Confidential Information" shall include the statements of account and any information contained therein, including the amount of royalty

payments and the number of Performances, and any information pertaining to the statements of account reasonably designated as confidential by the Noncommercial Webcaster submitting the statement.

(b) Exclusion. Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) Use of Confidential Information. In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) Disclosure of Confidential Information. Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate written confidentiality agreement or an ethical obligation to maintain the Confidential Information of the Collective, who are engaged in the collection and distribution of royalty payments hereunder and activities related directly thereto, for the purpose of performing such duties during the ordinary course of their work and who require access to the Confidential Information;

(2) An independent and Qualified Auditor, subject to an appropriate written confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Noncommercial Webcaster's statement of account pursuant to §380.____ or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to §380.____;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114(f) by the Noncommercial Webcaster whose Confidential Information is being supplied, subject to an appropriate written confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate written confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114(f) before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) Safeguarding of Confidential Information. The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but not less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§ 380. Verification of royalty payments.

(a) General. This section prescribes procedures by which the Collective may verify the royalty payments made by a Noncommercial Webcaster.

(b) Frequency of verification. The Collective may conduct a single audit of a Noncommercial Webcaster, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) Notice of intent to audit. The Collective must file with the Copyright Royalty Board a notice of intent to audit a particular Noncommercial Webcaster, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Noncommercial Webcaster to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, who may not be retained on a contingency fee basis and who shall be obligated to verify any underpayment or overpayment of royalties. The designation of the Qualified Auditor shall be binding on all parties. Any such audit shall be completed within 6 months of the date of the notification of intent to audit is served on the Noncommercial Webcaster.

(d) Acquisition and retention of report. The Noncommercial Webcaster shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) Acceptable verification procedure. An audit of Noncommercial Webcaster's books and records, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) Consultation. Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Noncommercial Webcaster being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Noncommercial Webcaster reasonably cooperates with the auditor to remedy promptly any factual error or clarify any issues raised by the audit.

(g) Costs of the verification procedure. The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Noncommercial Webcaster shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380. __ Verification of royalty distributions.

(a) General. This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) Frequency of verification. A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) Notice of intent to audit. A Copyright Owner or Performer must file with the Copyright Royalty Board a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice who may not be retained on a contingency fee basis and who shall be obligated to verify any underpayment or overpayment of royalties. The designation of the Qualified Auditor shall be binding on all Copyright Owners and Performers. Any such audit shall be completed within 6 months of the date of the notification of intent to audit is served on the Noncommercial Webcaster.

(d) Acquisition and retention of report. The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) Acceptable verification procedure. An audit of Noncommercial Webcaster's books and records, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) Consultation. Before rendering any interim or final written report to a Copyright Owner or Performer, except where the Qualified Auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the Qualified Auditor, prejudice the investigation of such suspected fraud, the Qualified Auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the Qualified Auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) Costs of the verification procedure. The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to

paying the amount of any underpayment, bear reasonable fees paid to the Qualified Auditor by the Collective for the verification procedure.

§ 380.____ Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this subpart, the Collective shall retain the required payment in a segregated trust account for a period of 5 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 5-year period. After expiration of this period, and except as may be subject to the common law or statutes of any State, the Collective may apply the unclaimed funds solely to offset any costs deductible under 17 U.S.C. 114(g)(3)(A). Nothing in this subsection is intended to preempt the laws of any State. The Collective shall render its best efforts to identify and locate copyright owners and featured artists in order to distribute royalties payable to them under section 112(e) or 114(d)(2) of title 17, United States Code, or both. Such efforts shall include searches in Copyright Office public records and published directories of sound recording copyright owners.

§ 380.____ Notice and Cure

For any material breach of these regulations by a Noncommercial Webcaster that the Collective intends to assert in any way against the Noncommercial Webcaster, the Collective shall first provide notice of such material breach to the Noncommercial Webcaster by certified mail, and the Noncommercial Webcaster shall have 30 days from the receipt of such notice of material breach to cure such material breach.

Index of Witness Testimony by Citation Format

<u>Citation Format</u>	<u>Witness Name</u>	<u>Type of Testimony</u>	<u>Exhibit Number</u>
Bender WRT	Jonathan Bender	Written Rebuttal	SX Ex. 0023
Emert WDT	Joseph Emert	Written Direct	NRBNMLC Ex. 7000
Henes WDT	Gene Henes	Written Direct	NRBNMLC Ex. 7011
Lys WRT	Professor Thomas Z. Lys	Written Rebuttal	SX Ex. 0028
Peterson CWRT	Dr. Steven R. Peterson	Corrected Written Rebuttal	NAB Ex. 4013
Rubinfeld CWDT	Professor Daniel Rubinfeld	Corrected Written Direct	SX Ex. 0017
Rubinfeld CWRT	Professor Daniel L. Rubinfeld	Corrected Written Rebuttal	SX Ex. 0029

**The National Religious Broadcasters Noncommercial Music License
Committee's Proposed Findings of Fact and Conclusions of Law
Redaction Log**

<u>Paragraph</u>	<u>Description</u>
56	Record label financial information designated RESTRICTED by SoundExchange
95	SoundExchange Licensee payment data designated RESTRICTED by SoundExchange
133	SoundExchange Licensee payment data designated RESTRICTED by SoundExchange
134	SoundExchange Licensee payment data designated RESTRICTED by SoundExchange
137	SoundExchange Licensee payment data designated RESTRICTED by SoundExchange
138	SoundExchange Licensee payment data designated RESTRICTED by SoundExchange
139	SoundExchange Licensee payment data designated RESTRICTED by SoundExchange
140	SoundExchange Licensee payment data designated RESTRICTED by SoundExchange
141	SoundExchange Licensee payment data designated RESTRICTED by SoundExchange